FEDERAL REGISTER

Vol. 78 Wednesday,
No. 142 July 24, 2013

Pages 44419–44870

OFFICE OF THE FEDERAL REGISTER

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WHEN: Tuesday, September 17, 2013
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

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Printed on recycled paper.

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A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register

Vol. 78, No. 142

Wednesday, July 24, 2013

FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2013–10]

Civil Monetary Penalties Inflation Adjustments

AGENCY: Federal Election Commission.

ACTION: Final rules.

SUMMARY: In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, the Federal Election Commission is adopting final rules to apply inflation adjustments to certain civil monetary penalties under the Federal Election Campaign Act of 1971, as amended, the Presidential Election Campaign Fund Act, and the Presidential Primary Matching Payment Account Act. The civil penalties being adjusted are for a knowing and willful violation of the prohibition against making a contribution in the name of another; and certain late filed or non-filed reports under the Commission's administrative fines program. The adjusted civil monetary penalties are calculated according to a statutory formula and will be effective for violations occurring after the effective date of these rules. Further information is provided in the supplementary information that follows.

DATES: These penalty adjustments are effective on July 24, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Ms. Cheryl A.F. Hemsley, or Ms. Jessica Selinkoff, Attorneys, 999 E Street NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (''Inflation Adjustment Act''),[1] requires Federal agencies to adjust for inflation the civil monetary penalties within their jurisdiction at least once every four years according to detailed formulas. The Inflation Adjustment Act defines a civil monetary penalty as any penalty, fine, or other sanction that is for a specific amount, or has a maximum amount, as provided by Federal law, and that a Federal agency assesses or enforces in an administrative proceeding or in a civil action in Federal court.[2] Under the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* (''FECA''), the Federal Election Commission has jurisdiction over several civil penalties for violations of FECA, the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.,* and the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9031 *et seq.* These rules fulfill the Commission's non-discretionary obligation under the Inflation Adjustment Act to adjust for inflation, according to the prescribed formulas, the civil penalties within its jurisdiction.

Immediate Effectiveness of Final Rules

The Inflation Adjustment Act requires the Commission to adjust the civil penalties under its jurisdiction by using a cost-of-living adjustment (''COLA'') formula. The application of this COLA does not involve any Commission discretion or policy judgments. Thus, the Commission finds that the ''good cause'' exception to the notice and comment requirement of the Administrative Procedure Act applies to these rules because notice and comment are unnecessary. 5 U.S.C. 553(b)(B), (d)(3).

For the same reasons, these rules do not need to be submitted to the Speaker of the House of Representatives or the President of the Senate under the Congressional Review Act, 5 U.S.C. 801 *et seq.,* and these rules are effective upon publication. 5 U.S.C. 808(2). Accordingly, these amendments are effective on July 24, 2013. The new civil penalties are applicable only to violations that occur after this effective date.[3]

Explanation and Justification

Under the Inflation Adjustment Act, the Commission must adjust civil penalties by a COLA defined as the percentage by which the U.S. Department of Labor's Consumer Price Index for all urban consumers (''CPI'') for June of the year preceding the adjustment exceeds the CPI for June of the year in which each civil penalty was last set or adjusted.[4] The amount of the resulting increase is then subject to rounding rules based on the size of the civil penalty.[5] The Inflation Adjustment Act imposes a 10% cap on the first adjustment under its rules, but no cap on subsequent adjustments.[6] That is, the first adjustment of a civil penalty may not exceed 10% of the starting civil penalty.

The Commission has previously applied the Inflation Adjustment Act formulas to its civil penalties in 1997, 2002, 2005, and 2009.[7] As explained below, the Inflation Adjustment Act now requires the Commission to adjust one civil penalty in 11 CFR 111.24 and some civil penalties in 11 CFR 111.43. Because of the rounding rules, the other civil penalties within the Commission's jurisdiction will not change.

1. 11 CFR 111.24—General Civil Penalties

FECA establishes civil penalties for violations of FECA or the other statutes within the Commission's jurisdiction.

[1] Pub. L. 101–410, 104 Stat. 890 (codified at 28 U.S.C. 2461 note), as amended by Debt Collection Improvement Act of 1996, Pub. L. 104–134, sec. 31001(s)(1), 110 Stat. 1321, 1373; Federal Reports Elimination Act of 1998, Pub. L. 105–362, sec. 1301, 112 Stat. 3280.

[2] Inflation Adjustment Act sec. 3(2).

[3] *Id.* sec. 6.

[4] *Id.* sec. 5(b).

[5] *Id.* sec. 5(a). The rounding rules applicable to the Commission's civil penalties require that if the existing penalty is less than or equal to $100, the increase is rounded to the nearest $10; if the existing penalty is greater than $100 but less than or equal to $1,000, the increase is rounded to the nearest $100; if the existing penalty is greater than $1,000 but less than or equal to $10,000, the increase is rounded to the nearest $1,000; and if the existing penalty is greater than $10,000 but less than or equal to $100,000, the increase is rounded to the nearest $5,000.

[6] Pub. L. 104–134, sec. 31001(s)(2), 110 Stat. 1321, 1373.

[7] *See* Explanation and Justification for Final Rules on Civil Monetary Penalties Inflation Adjustments, 74 FR 31345 (July 1, 2009), *amended by* Explanation and Justification for Final Rules on Civil Monetary Penalties Inflation Adjustments; Correction, 74 FR 37161 (July 28, 2009) (collectively, ''2009 Adjustment''), Explanation and Justification for Final Rules on Inflation Adjustments for Civil Monetary Penalties, 70 FR 34633 (June 15, 2005) (''2005 Adjustment''), Explanation and Justification for Final Rules on Adjustments to Civil Monetary Penalty Amounts, 62 FR 11316 (Mar. 12, 1997). In January 2002, the rounding rules resulted in no adjustments. Agenda Doc. 02–06 (Jan. 17, 2002).

Those statutory civil penalties are found at 2 U.S.C. 437g(a)(5), (6), and (12). Commission regulations in 11 CFR 111.24 set forth each such civil penalty, as adjusted pursuant to the Inflation Adjustment Act.

These final rules adjust only one statutory civil penalty: the $50,000 civil penalty established by 2 U.S.C. 437g(a)(5)(B), which is currently at the 2009 level of $60,000. 11 CFR 111.24(a)(2)(ii).[8] To determine the 2013 COLA, the CPI for June 2012 (229.478)[9] is divided by the CPI for June 2009 (215.693), the year the civil penalty was last adjusted, for an increase of 6.4%. Next, the raw inflation adjustment is determined by multiplying the present civil penalty ($60,000) by the COLA (0.064) for a raw increase of $3,840, which is rounded to $5,000. Finally, the rounded increase is added to the civil penalty, for a new section 111.24(a)(2)(ii) civil penalty of $65,000.

Using the same Inflation Adjustment Act formulas, the Commission has also reviewed the other civil penalties in 11 CFR 111.24. None of those other civil penalties will change this year because of the rounding rules.

Section	Previous civil penalty	Last adjusted	COLA	Raw increase	Rounded increase	New civil penalty
11 CFR 111.24(a)(1)	$7,500	2009	0.064	$480.00	$0	unchanged.
11 CFR 111.24(a)(2)(i)	16,000	2009	0.064	1,024.00	0	unchanged.
11 CFR 111.24(a)(2)(ii)	60,000	2009	0.064	3,840.00	5,000	65,000.
11 CFR 111.24(b)	3,200	2009	0.064	204.80	0	unchanged.
11 CFR 111.24(b)	7,500	2009	0.064	480.00	0	unchanged.

2. 11 CFR 111.43, 111.44—Administrative Fines

FECA permits the Commission to assess civil penalties for violations of the reporting requirements of 2 U.S.C. 434(a) in accordance with schedules of penalties established and published by the Commission. 2 U.S.C. 437g(a)(4)(C)(i). The penalty schedule in 11 CFR 111.43(a) applies to reports that are not election sensitive, and the schedule in 11 CFR 111.43(b) applies to reports that are election sensitive.[10] Each schedule contains two columns of penalties, one for late-filed reports and one for non-filed reports, with penalties based on the level of financial activity in the report and its lateness (where applicable).[11] In addition, 11 CFR 111.43(c) establishes a civil penalty for situations in which a committee fails to file a report and the Commission cannot calculate the relevant level of activity. Finally, 11 CFR 111.44 establishes a civil penalty for failure to file timely reports of contributions received less than 20 days, but more than 48 hours, before an election. *See* 2 U.S.C. 434(a)(6).

The schedules in 11 CFR 111.43 were set in 2003 when the Commission re-promulgated its Administrative Fines program, which implements 2 U.S.C. 437g(a)(4)(C). *See* Explanation and Justification for Final Rules on Administrative Fines, 68 FR 12572 (Mar. 17, 2003). In 2005, the Commission applied the Inflation Adjustment Act formulas to the civil penalties in section 111.43 but did not adjust any of the penalties because of the rounding rules. *See* 2005 Adjustment, 70 FR at 34635. Under the same procedures, the Commission adjusted some, but not all, of these civil penalties in 2009. *See* 2009 Adjustment, 74 FR at 31348–49 (renumbering schedules and adjusting some penalties for inflation).

For purposes of the current adjustments, the Commission multiplies each civil penalty that was raised in 2009 by a COLA of 0.064. For those civil penalties set in 2003 and unchanged in 2009, the Commission multiplies each civil penalty by a COLA of 0.249.[12] Next, the Commission applies the statutory rounding formula to each of these raw increases. The resulting rounded increase is then added to the current civil penalty to determine the new raw civil penalty. Finally, the statutory 10% penalty cap is applied as necessary, i.e., to penalties that the Commission is adjusting this year for the first time. The actual adjustment to each civil penalty is shown in the schedules in the rule text, below.

The $6,050 civil penalty in 11 CFR 111.43(c) was adjusted in 2009,[13] so the Commission multiplies it by a COLA of 0.064. Because of the rounding rules, this civil penalty will not change this year.

The penalty in 11 CFR 111.44 was last adjusted in 2005,[14] so the Commission multiplies it by a COLA of 0.18.[15] Because of the rounding rules, this civil penalty will not change this year.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The provisions of the Regulatory Flexibility Act are not applicable to this final rule because the Commission was not required to publish a notice of proposed rulemaking or to seek public comment under 5 U.S.C. 553 or any other laws. 5 U.S.C. 603(a), 604(a). Therefore, no regulatory flexibility analysis is required.

List of Subjects in 11 CFR Part 111

Administrative practice and procedures, Elections, Law enforcement, Penalties.

For the reasons set out in the preamble, the Federal Election Commission amends subchapter A of chapter I of title 11 of the *Code of Federal Regulations* as follows:

PART 111—COMPLIANCE PROCEDURE (2 U.S.C. 437g, 437d(a))

■ 1. The authority citation for part 111 continues to read as follows:

Authority: 2 U.S.C. 432(i), 437g, 437d(a), 438(a)(8); 28 U.S.C. 2461 nt.

■ 2. Section 111.24 is amended by revising paragraph (a)(2)(ii) to read as follows:

§ 111.24 Civil Penalties (2 U.S.C. 437g(a)(5), (6), (12), 28 U.S.C. 2461 nt.).

(a) * * *

(2) * * *

(ii) Notwithstanding paragraph (a)(2)(i) of this section, in the case of a

[8] *See* 2009 Adjustment, 74 FR at 31347.

[9] U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index: All Urban Consumers (May 16, 2013), *available at ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt*.

[10] Election sensitive reports are certain reports due shortly before an election. *See* 11 CFR 111.43(d)(1).

[11] A report is considered to be ''not filed'' if it is never filed or is filed more than a certain number of days after its due date. *See* 11 CFR 111.43(e).

[12] The CPI for June 2012 (229.478) divided by the CPI for June 2003 (183.7) equals an increase of 24.9%.

[13] *See* 2009 Adjustment, 74 FR at 37161 (correcting amount to $6,050).

[14] *See* 2005 Adjustment, 70 FR at 34635; Explanation and Justification for Final Rules on Administrative Fines, 65 FR 31787, 31793 (May 19, 2000); *see also* 2009 Adjustment, 74 FR at 31347 (not adjusting this penalty due to rounding rules).

[15] The CPI for June 2012 (229.478) divided by the CPI for June 2005 (194.5) equals an increase of 18%.

knowing and willful violation of 2 U.S.C. 441f, the civil penalty shall not be less than 300% of the amount of any contribution involved in the violation and shall not exceed the greater of $65,000 or 1,000% of the amount of any contribution involved in the violation.

* * * * *

■ 3. Section 111.43 is amended by revising paragraphs (a) and (b) to read as follows:

§ 111.43 What are the schedules of penalties?

(a) The civil money penalty for all reports that are filed late or not filed, except election sensitive reports and pre-election reports under 11 CFR 104.5, shall be calculated in accordance with the following schedule of penalties:

If the level of activity in the report was:	And the report was filed late, the civil money penalty is:	Or the report was not filed, the civil money penalty is:
$1–4,999.99 [a]	[$27.50 + ($5 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$275 × [1 + (.25 × Number of previous violations)].
$5,000–9,999.99	[$55 + ($5 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$330 × [1 + (.25 × Number of previous violations)].
$10,000–24,999.99	[$110 + ($5 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$550 × [1 + (.25 × Number of previous violations)].
$25,000–49,999.99	[$200 + ($20 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$1090 × [1 + (.25 × Number of previous violations)].
$50,000–74,999.99	[$330 + ($92.50 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$2970 × [1 + (.25 × Number of previous violations)].
$75,000–99,999.99	[$440 + ($110 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$3850 × [1 + (.25 × Number of previous violations)].
$100,000–149,999.99	[$660 + ($125 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$4950 × [1 + (.25 × Number of previous violations)].
$150,000–199,999.99	[$980 + ($150 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$6050 × [1 + (.25 × Number of previous violations)].
$200,000–249,999.99	[$1100 + ($175 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$7150 × [1 + (.25 × Number of previous violations)].
$250,000–349,999.99	[$1500 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$9800 × [1 + (.25 × Number of previous violations)].
$350,000–449,999.99	[$2000 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$10,900 × [1 + (.25 × Number of previous violations)].
$450,000–549,999.99	[$2750 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$10,450 × [1 + (.25 × Number of previous violations)].
$550,000–649,999.99	[$3300 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$11,000 × [1 + (.25 × Number of previous violations)].
$650,000–749,999.99	[$3850 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$11,550 × [1 + (.25 × Number of previous violations)].
$750,000–849,999.99	[$4400 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$12,100 × [1 + (.25 × Number of previous violations)].
$850,000–949,999.99	[$4950 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$12,650 × [1 + (.25 × Number of previous violations)].
$950,000 or over	[$5500 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$13,200 × [1 + (.25 × Number of previous violations)].

[a] The civil money penalty for a respondent who does not have any previous violations will not exceed the level of activity in the report.

(b) The civil money penalty for election sensitive reports that are filed late or not filed shall be calculated in accordance with the following schedule of penalties:

If the level of activity in the report was:	And the report was filed late, the civil money penalty is:	Or the report was not filed, the civil money penalty is:
$1–$4,999.99 [a]	[$55 + ($10 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$550 × [1 + (.25 × Number of previous violations)].
$5,000–$9,999.99	[$110 + ($10 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$660 × [1 + (.25 × Number of previous violations)].
$10,000–24,999.99	[$150 + ($10 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$1090 × [1 + (.25 × Number of previous violations)].
$25,000–49,999.99	[$330 + ($27.50 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$1,400 × [1 + (.25 × Number of previous violations)].
$50,000–74,999.99	[$495 + ($92.50 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$3300 × [1 + (.25 × Number of previous violations)].
$75,000–99,999.99	[$660 + ($110 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$4400 × [1 + (.25 × Number of previous violations)].
$100,000–149,999.99	[$1090 + ($125 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$5500 × [1 + (.25 × Number of previous violations)].
$150,000–199,999.99	[$1200 + ($150 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$6600 × [1 + (.25 × Number of previous violations)].
$200,000–249,999.99	[$1500 + ($175 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$9250 × [1 + (.25 × Number of previous violations)].

If the level of activity in the report was:	And the report was filed late, the civil money penalty is:	Or the report was not filed, the civil money penalty is:
$250,000–349,999.99	[$2475 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$10,900 × [1 + (.25 × Number of previous violations)].
$350,000–449,999.99	[$3300 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$11,000 × [1 + (.25 × Number of previous violations)].
$450,000–549,999.99	[$4125 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$12,100 × [1 + (.25 × Number of previous violations)].
$550,000–649,999.99	[$4950 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$13,200 × [1 + (.25 × Number of previous violations)].
$650,000–749,999.99	[$5775 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$14,300 × [1 + (.25 × Number of previous violations)].
$750,000–849,999.99	[$6600 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$15,400 × [1 + (.25 × Number of previous violations)].
$850,000–949,999.99	[$7425 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$16,500 × [1 + (.25 × Number of previous violations)].
$950,000 or over	[$9250 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	$17,600 × [1 + (.25 × Number of previous violations)].

[a] The civil money penalty for a respondent who does not have any previous violations will not exceed the level of activity in the report.

* * * * *

On behalf of the Commission.

Dated: July 18, 2013.

Ellen L. Weintraub,

Chair, Federal Election Commission.

[FR Doc. 2013–17703 Filed 7–23–13; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0638; Directorate Identifier 2013–SW–026–AD; Amendment 39–17519; AD 2013–15–03]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France (Eurocopter) Helicopters

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

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for Eurocopter Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D, and AS350D1 helicopters with a single hydraulic system and a certain hydraulic pump drive installed. This AD requires inspecting the hydraulic pump drive pulley bearing (pulley bearing) for leaks, rust, overheating, and condition. This AD is prompted by six reports of hydraulic pump drive belt failure caused by seizure of the pulley bearing. These actions are intended to prevent hydraulic pump drive belt failure, loss of hydraulic servo assistance, and subsequent loss of control of the helicopter.

DATES: This AD becomes effective August 8, 2013.

We must receive comments on this AD by September 23, 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 foreign authority's 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 American Eurocopter Corporation, 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.eurocopter.com/techpub.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

FOR FURTHER INFORMATION CONTACT: Matt Wilbanks, Aviation Safety Engineer, Regulations and Policy Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *matt.wilbanks@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

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Emergency AD No. 2013–0044–E, dated February 27, 2013, to correct an unsafe condition for Eurocopter Model AS350B, AS350BA, AS350BB, AS350B1, AS350B2, AS350B3, and AS350D helicopters. EASA advises that six events were reported of hydraulic pump drive belt failure caused by seizure of the pulley bearing, and that a preliminary investigation concluded the installation of a new hydraulic pump drive (installed in accordance with Eurocopter modification 079566) may have caused excessive degradation. EASA further states that this condition, for helicopters with a single hydraulic system, can lead to loss of hydraulic servo assistance and an increase in pilot work load that requires landing as soon as possible. For these reasons, the EASA AD requires repetitive inspections of the hydraulic pump drive belt and pulley bearing and if required, replacing the hydraulic pump drive assembly.

FAA's Determination

These helicopters have been approved by the aviation authority of France and are approved for operation in the United States. Pursuant to our bilateral agreement with France, EASA, its technical representative, has notified us of the unsafe condition described in the EASA AD. We are issuing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs.

Related Service Information

Eurocopter issued AS350 Emergency Alert Service Bulletin No. 05.00.72, Revision 1, dated June 11, 2013 (EASB 05.00.72), for Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, ASAS350D, and for non-FAA type-certificated Models AS350L1 and AS350BB helicopters. EASB 05.00.72 describes procedures for inspecting the pulley bearing for leaking grease, condition of the lip seals, rust on the lip seals, evidence of overheating revealed by brown discoloring of the bearing, and for the condition of the sealing flanges. EASB 05.00.72 also describes procedures for rotating the bearing manually to determine if there are any friction points, brinelling, or noises from the bearing. EASB 05.00.72 requires these inspections within 10 hours time-in-service (TIS) for installed bearings with 165 or more hours TIS since installation. For bearings with less than 165 hours TIS since installation, EASB 05.00.72 requires inspecting the bearing upon reaching 165 hours TIS.

AD Requirements

This AD requires, for hydraulic pump drives with 165 or more hours TIS since installation, within 10 hours TIS and thereafter at intervals not exceeding 25 hours TIS, decoupling the pulley and inspecting the pulley bearing for leaking grease, a crack or tear in the lip seals, a run of rust on the lip seals, indication of overheating shown by brown coloring on the inner ring of the bearing, any distortion, impact, wear, a tear, a crack, or loss of grease on the sealing flanges, or for a friction point, brinelling, or noise from the bearing. If any of these conditions exist, this AD requires replacing the hydraulic pump drive assembly before further flight. If the hydraulic pump drive assembly is replaced, the repetitive inspection requirements of this AD still apply.

Interim Action

We consider this AD to be an interim action. Eurocopter is still investigating the cause of this condition. If a final action is later identified, we might consider additional rulemaking.

Costs of Compliance

We estimate that this AD will affect 36 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 rate of $85 per hour, inspecting the bearing pulley would require about 1.5 work-hours, for a cost per helicopter of $128, and a total cost to U.S. operators of $4,608, per inspection cycle.

If required, replacing the hydraulic pump drive assembly would require about 1.5 work-hours, and required parts would cost about $8,543, for a total cost per helicopter of $8,671.

According to Eurocopter'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 Eurocopter. 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 in the helicopter emergency medical service and air tour industries.

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):

2013–15–03 Eurocopter France (Eurocopter): Amendment 39–17519; Docket No. FAA–2013–0638; Directorate Identifier 2013–SW–026–AD.

(a) Applicability

This AD applies to Eurocopter Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D and AS350D1 helicopters with a single hydraulic system and with a hydraulic pump drive installed in accordance with modification 079566 that has 165 or more hours time-in-service (TIS) since installation, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as seizure of the hydraulic pump drive pulley bearing. This condition could result in hydraulic pump drive belt failure, loss of hydraulic servo assistance, and subsequent loss of control of the helicopter.

(c) Comments Due Date

We must receive comments on this AD by September 23, 2013.

(d) Effective Date

This AD becomes effective August 8, 2013.

(e) Compliance

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

(f) Required Actions

Within 10 hours TIS, and thereafter at intervals not exceeding 25 hours TIS:

(1) Uncouple the pulley from the hydraulic pump.

(2) Using a mirror and a light, inspect the hydraulic pump drive pulley bearing (pulley bearing) for leaking grease from each lip seal of the four greasing orifices (lip seal) due to wear, a crack or tear in a lip seal, a run of rust on a lip seal, indication of overheating shown by brown coloring on the inner ring of the bearing, and for any distortion, impact, wear, a tear, a crack, or loss of grease on each sealing flange.

(3) Manually rotate the pulley bearing through several full turns and inspect for a friction point, brinelling, or a noise from the bearing.

(4) If there is any leaking grease from a lip seal, a crack or tear in a lip seal, a run of rust on a lip seal, indication of overheating shown by brown coloring on the inner ring of the bearing, or distortion, impact, wear, a tear, a crack, or loss of grease on a sealing flange, or a friction point, brinelling, or noise from the bearing, before further flight, replace the hydraulic pump drive assembly.

(g) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Matt Wilbanks, Aviation Safety Engineer, Regulations and Policy Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *matt.wilbanks@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) Additional Information

(1) Eurocopter AS350 Emergency Alert Service Bulletin No. 05.00.72, Revision 1, dated June 11, 2013, which is not incorporated by reference, contains additional information about the subject of this AD. For service information identified in this AD, contact American Eurocopter Corporation, 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.eurocopter.com/techpub.* You may review a copy of the service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth Texas 76137.

(2) The subject of this AD is addressed in European Aviation Safety Agency (EASA) Emergency AD No. 2013–0044–E, dated February 27, 2013. You may view the EASA AD in the AD docket on the Internet at *http://www.regulations.gov.*

(i) Subject

Joint Aircraft Service Component (JASC) Code: 2913: Hydraulic Pump, Main.

Issued in Fort Worth, Texas, on July 11, 2013.

Kim Smith,

Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2013–17622 Filed 7–23–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 357

[Docket No. RM12–18–000; Order No. 783]

Revisions to Page 700 of FERC Form No. 6

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is modifying Page 700 of FERC Form No. 6 (Form 6) to facilitate the calculation of an oil pipeline's actual return on equity for preliminary screening purposes. The Commission will expand the information provided regarding Rate Base (line 5), Rate of Return (line 6), Return on Rate Base (line 7), and Income Tax Allowance (line 8).

DATES: *Effective Date:* This rule will become effective September 23, 2013.

FOR FURTHER INFORMATION CONTACT:
James Sarikas (Technical Information), Office of Energy Market Regulation, 888 First Street NE., Washington, DC 20426, (202) 502–6831, *James.Sarikas@ferc.gov.*
Brian Holmes (Technical Information), Office of Enforcement, 888 First Street NE., Washington, DC 20426, (202) 502–6008, *Brian.Holmes@ferc.gov.*
Andrew Knudsen (Legal Information), Office of the General Counsel, 888 First Street NE., Washington, DC 20426, (202) 502–6527, *Andrew.Knudsen@ferc.gov*.

SUPPLEMENTARY INFORMATION:

144 FERC ¶ 61,049

Final Rule

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144 FERC ¶ 61,049

Before Commissioners: Jon Wellinghoff, Chairman; Philip D. Moeller, John R. Norris, Cheryl A. LaFleur, and Tony Clark.

Final Rule

(Issued July 18, 2013)

I. Introduction

1. The Federal Energy Regulatory Commission (Commission) is issuing this Final Rule to modify the reporting requirements on Page 700, Annual Cost of Service Based Analysis Schedule, of FERC Form No. 6, Annual Report of Oil Pipeline Companies (Form 6), to facilitate the calculation of an oil pipeline's actual rate of return on equity based upon Page 700 data for preliminary screening purposes. The modifications to Page 700 include requiring additional information regarding rate base, rate of return, return on rate base, and income taxes.

II. Background

2. The Commission is responsible for regulating the rates, terms and conditions that oil pipelines charge for transportation under the Interstate Commerce Act (ICA).[1] The ICA prohibits oil pipelines from charging rates that are unjust and unreasonable and permits shippers and the Commission to challenge both pre-existing and newly filed rates.[2]

3. To assist the Commission in the administration of its jurisdictional responsibilities, the ICA authorizes the Commission to prescribe annual or other periodic reports.[3] Through Form 6, the Commission collects annual financial information from crude and refined product pipelines[4] subject to the Commission's jurisdiction, as prescribed in section 357.2 of the Commission's regulations.[5]

4. Page 700 of Form 6 provides a simplified presentation of an oil pipeline's jurisdictional cost-of-service. Page 700 serves as a preliminary screening tool to evaluate oil pipeline rates.[6] However, ''Page 700 information alone is not intended to show what a just and reasonable rate should be.''[7] Currently, oil pipelines are required to provide the following on Page 700: Operating and Maintenance Expenses (line 1), Depreciation Expense (line 2), AFUDC Depreciation (line 3), Amortization of Deferred Earnings (line 4), Rate Base (line 5), Rate of Return (line 6), Return on Rate Base (line 7), Income Tax Allowance (line 8), Total Cost of Service (line 9), Total Interstate Operating Revenues (line 10), Total Interstate Throughput in Barrels (line 11), and Total Interstate Throughput in Barrel-Miles (line 12).

5. On September 20, 2012, consistent with its obligation to ensure oil pipeline rates are just and reasonable, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to modify the reporting requirements on Page 700 of Form 6 to allow shippers and interested entities to more easily calculate an oil pipeline's actual rate of return on equity for

[1] 49 App. U.S.C. 1–85 (2000).

[2] 49 U.S.C. 13(1), 15(1), (7). Just and reasonable rate are ''rates yielding sufficient revenue to cover all proper costs, including federal income taxes, plus a specified return on invested capital.'' *City of Charlottesville* v. *FERC,* 774 F.2d 1205, 1207 (D.C. Cir. 1985).

[3] 49 App. U.S.C. 1–85 (2000).

[4] Hereafter, the term oil pipeline shall include both crude and refined product oil pipelines.

[5] 18 CFR 357.2 (2012).

[6] All jurisdictional oil pipelines, except the Trans-Alaskan oil pipeline System (TAPS) oil pipelines, are required to file Page 700, including oil pipelines exempt from filing the full Form 6. 18 CFR 357.2(a)(2) and (a)(3) (2012). Section 1804(2)(B) of the Energy Policy Act of 1992 excludes from the provisions of the Act, for ratemaking purposes, TAPS and any oil pipeline delivering oil directly or indirectly to TAPS. Therefore, the Commission exempted the TAPS entities from having to submit the information required on Page 700. *Cost of Service Requirements and Filing Requirements for Oil Pipelines,* Order No. 571, FERC Stats. & Regs. ¶ 31,006, at 31,175 (1995), *on reh'g,* Order No. 571–A, FERC Stats. & Regs. ¶ 31,012 (1994).

[7] Order No. 571–A, FERC Stats. & Regs. ¶ 31,012 at 31,254.

preliminary screening purposes.[8] The NOPR reasoned the actual rate of return on equity is particularly useful information when using Page 700 to make a preliminary evaluation of an oil pipeline's rates consistent with the Commission's mandate under the ICA. To this end, the NOPR proposed to make changes to Page 700 to include additional supporting information the Commission anticipates is already developed in the preparation of the rate base, rate of return, return on rate base, and income taxes reported on Page 700.

III. NOPR Comments

6. The Association of Oil Pipelines (AOPL),[9] the Kansas Corporation Commission (KCC), R. Gordon Gooch (Mr. Gooch), Airlines for America (A4A)[10] and the National Propane Gas Association (NPGA),[11] the Canadian Association of Petroleum Producers (CAPP), Suncor Energy Marketing Inc. (Suncor), ConocoPhillips Co. (ConocoPhillips), BP West Coast Products, LLC and Western Refining Company, L.P. (collectively, BP), and Valero Marketing and Supply Company (Valero) filed comments in response to the Commission's NOPR. Suncor and AOPL filed reply comments. The comments are addressed below.

IV. Discussion

7. The majority of commenters support the NOPR. In contrast, the Association of Oil Pipelines (AOPL) believes the proposed modifications are unnecessary. We address AOPL's arguments below.

8. As discussed below, the Commission adopts, with minor modifications to the labeling of the additional lines on Page 700, the NOPR's proposal to enhance the information provided on Page 700 related to rate base, rate of return, return on rate base, and income tax allowance.

A. Rate Base

1. NOPR

9. The NOPR observed that ''[c]omponents of an oil pipeline's rate base are governed by the trended original cost methodology adopted in Opinion No. 154–B.''[12] Under this methodology, an oil pipeline's rate base consists of: (1) The depreciated original cost rate base, (2) any unamortized amounts from the oil pipeline's starting rate base write-up (SRB), and (3) accumulated net deferred earnings. Consistent with Opinion No. 154–B,[13] the NOPR proposed to enhance the reporting of the total trended original cost (TOC) rate base information provided on line 5 of page 700 by requiring the reporting of the three subparts of the TOC rate base: (1) Rate Base—Original Cost (proposed line 5a); (2) Rate Base—Unamortized Starting Rate Base Write-Up (proposed line 5b); and (3) Rate Base—Accumulated Net Deferred Earnings (proposed line 5c). Thus, the NOPR explained the sum of proposed lines 5a, 5b, and 5c comprise the oil pipeline's TOC Rate Base. Consequently, the NOPR proposed to move the TOC rate base from line 5 to line 5d and to label line 5d as Total Rate Base—Trended Original Cost—(line 5a + line 5b + line 5c).

2. Comments

10. AOPL requests clarification as to proposed line 5a. AOPL seeks clarification that line 5a is intended to reflect the respondent's depreciated original cost rate base, consistent with the methodology contained in Opinion No. 154–B, *et al.*[14]

3. Commission Determination

11. The Commission adopts the NOPR proposal to enhance the rate base information provided on Page 700 by adding lines 5a, 5b, and 5c to Page 700 to provide the three subparts of the TOC rate base. The new line 5 series will reflect the following additions as proposed in the NOPR: (1) Rate Base—Depreciated Original Cost (line 5a); (2) Rate Base—Unamortized Starting Rate Base Write-up (line 5b); and (3) Rate Base—Accumulated Net Deferred Earnings (line 5c). The sum of lines 5a, 5b, and 5c comprise the oil pipeline's TOC rate base, which is currently reported on line 5 and which will now move to line 5d and be entitled Total Rate Base—Trended Original Cost—(line 5a + line 5b + line 5c). As requested by AOPL, the Commission affirms new line 5a is intended to reflect the respondent's depreciated original cost rate base consistent with Opinion No. 154–B and it will be titled to reflect such intent. The depreciated original cost rate base will be added to the other two subparts, which will comprise the oil pipeline's total TOC rate base.

B. Rate of Return

1. NOPR

12. The NOPR proposed to require oil pipelines to report the cost of equity, cost of debt, and the capital structure supporting the overall weighted cost of capital currently reported as Rate of Return on line 6, Page 700. Specifically, the NOPR proposed to include additional information related to debt and equity capital structure ratios, i.e. (1) Rate of Return—Adjusted Capital Structure Ratio for Long Term Debt (proposed line 6a), (2) Rate of Return—Adjusted Capital Structure Ratio for Proprietary Capital (proposed line 6b).[15] The NOPR further proposed to add information related to the cost of debt and the cost of equity, specifically: (1) Rate of Return—Cost of Long Term Debt Capital (proposed line 6c) and (2) Rate of Return—Real Cost of Proprietary Capital (proposed line 6d). This additional information forms the basis for the Rate of Return—Weighted Average Cost of Capital (the sum of the product of line 6a × line 6c added to the product of line 6b × line 6d), which is now reported as Rate of Return on line 6 on Page 700 and which the NOPR proposed to move to line 6e.

2. Comments

13. AOPL seeks clarification as to proposed lines 6b and 6d. AOPL notes that the term Proprietary Capital is not defined and does not appear in any Commission regulations governing oil pipelines.[16] Therefore, to the extent the Commission determines it is appropriate to provide additional information regarding the weighted average cost of capital, AOPL requests that the Commission ''clarify line 6b is to provide the adjusted equity capital ratio computed in a manner consistent with the Commission's prior findings in Opinion No. 351–A, and that line 6d is to provide the allowed real return on equity referenced in the Commission's policy statement regarding the determination of oil pipeline equity returns.''[17]

14. In contrast, A4A and the NPGA submitted comments agreeing that the proposed information is necessary to

[8] *Revisions to Page 700 of FERC Form No. 6,* 77 FR 59343 (Sept. 9, 2012), FERC Stats. & Regs. ¶ 32,692 (2012) (NOPR).

[9] AOPL is a trade association that represents the interests of common carrier oil pipelines. AOPL's members transport almost 85 percent of the crude oil and refined petroleum products shipped through oil pipelines in the U.S.

[10] A4A is an airline trade association whose members account for more than 90 percent of the passenger and cargo traffic carried by U.S. airlines.

[11] NPGA is a trade association of the U.S. propane industry with a membership of about 3,000 companies, including 38 affiliated state and regional associations representing members in all 50 states.

[12] NOPR, FERC Stats. & Regs. ¶ 32,692 at P 9.

[13] *Williams Pipe Line Co.,* Opinion No. 154–B, 31 FERC ¶ 61,377 (1985).

[14] AOPL Comments at 21 (citing Opinion No. 154–B, 31 FERC ¶ 61,377).

[15] NOPR, FERC Stats. & Regs. ¶ 32,692 at P 9 n.13 (citing *ARCO Pipe Line Co.,* Opinion No. 351–A, 53 FERC ¶ 61,398 at 62,388–89 (1990)).

[16] AOPL Comments at 21.

[17] *Id.* at 22 (citing Opinion No. 351–A, 53 FERC at 62,388–89; *Composition of Proxy Groups for Determining Gas and Oil Pipeline Return on Equity,* 123 FERC ¶ 61,048, at P 62 (2008)).

understand both the return on rate base composition and an oil pipeline's actual rate of return on equity.[18] However, A4A and NPGA propose that the Commission revise its Rate of Return—Real Cost of Propriety Capital of 14.25 percent that appears in proposed line 6d, ''because the figure seems anomalously large as a real rate of return on equity.'' [19]

3. Commission Determination

15. The Commission adopts the NOPR proposal to enhance the rate of return information on Page 700 by adding to line 6 of Page 700, as modified below. The NOPR's use of the term Proprietary Capital was not meant to create a new ratemaking concept. The Commission borrowed the term Proprietary Capital from the listing of balance sheet chart of accounts in the Uniform System of Accounts (USofA) for the natural gas and electric industries.[20] The corresponding title for the oil industry as shown in account 797, Form of Balance Sheet Statement is Stockholder's Equity.[21]

16. To be consistent with the language of the USofA for the oil pipeline industry, the Commission will change the term Proprietary Capital in the line 6 series to Stockholder's Equity. The Commission also grants AOPL's clarification that the adjusted equity capital ratio should be calculated in a manner consistent with the Commission's prior findings in Opinion No. 351–A. Likewise, the Commission notes that AOPL is correct that line 6d is intended to provide the allowed real return on equity referenced in the Commission's Return on Equity Policy Statement.

17. The Commission adopts the NOPR proposal to enhance the rate of return information on Page 700 by adding data to line 6 of Page 700. The new line 6 series will reflect a wording change as clarified above and will include additional information related to debt and equity capital structure ratios in the following manner: (1) Rate of Return—Adjusted Capital Structure Ratio for Long Term Debt (line 6a), (2) Rate of Return—Adjusted Capital Structure Ratio for Stockholder's Equity (line 6b). The Commission further adds information related to the cost of debt and the cost of equity, specifically: (1) Rate of Return—Cost of Long Term Debt Capital (line 6c), (2) Rate of Return—Real Cost of Stockholder's Equity (line 6d). This additional information forms the basis for the Rate of Return—Weighted Average Cost of Capital (the sum of the product line 6a and line 6c added to the product of line 6b and 6d), which is now reported as Rate of Return on line 6 on Page 700 and which the Commission proposes to move to line 6e, and label Rate of Return—Weighted Average Cost of Capital—(line 6a × line 6c + line 6b × line 6d).

18. The Commission denies A4A's and NPGA's request to change the 14.25 percent figure in Appendix B. The inputs contained in Appendix B were solely used for illustrative purposes and should not be viewed as having any precedential value.

C. Return on Rate Base

1. NOPR

19. The NOPR proposed to require oil pipelines to report additional information related to the Return on Rate Base in line 7.[22] The Return on Rate Base currently reported on line 7 combines the oil pipeline's real return on equity and the portion of the oil pipeline's return allocated to paying its cost of debt. The NOPR proposed to require the oil pipeline to include on Page 700 the Return on Rate Base—Debt Component (proposed line 7a) [23] and to require the oil pipeline to report its weighted average cost of capital consisting of debt and equity to one rate base. The real cost of capital excludes the inflationary component of the nominal return that is added to the Net Deferred Earnings and subsequently amortized pursuant to the TOC methodology. Proposed line 7b is the Return on Rate Base—Equity Component. The NOPR proposed that oil pipelines report on proposed line 7c, the Total Return on Rate Base—(line 7a + line 7b), which is the same information currently reported on line 7.

2. Comments

20. A4A and NPGA request that instructions to Page 700 recognize that the Return on Rate Base—Debt Component (line 7a) will equal the product of the Trended Original Cost Rate Base (proposed line 5d) and the weighted average cost of debt (itself the product of proposed lines 6a and 6c), while the Return on Rate Base—Equity Component (line 7b) will equal the product of the Trended Original Cost Rate Base (proposed line 5d) and the weighted average cost of equity (product of proposed lines 6b and 6d).

3. Commission Determination

21. The Commission adopts the NOPR proposal and grants the requested clarifications. The Commission will change the proposed wording for lines 7a and 7b to include a parenthetical formula as described by A4A and NPGA. The title for the new line 7a will read ''Return on Rate Base—Debt Component—(line 5d × line 6a × line 6c).'' The title for new line 7b will read ''Return on Rate Base—Equity Component—(line 5d × line 6b × line 6d).''

D. Composite Income Tax Rate

1. NOPR

22. The NOPR proposed to modify Page 700 to include the Composite Tax Rate used to determine the Income Tax Allowance.[24] (Line 8 of Page 700 currently requires each oil pipeline to report the total dollar amount attributable to the Income Tax Allowance in its cost-of-service.). The NOPR proposed to add a new line 8a which will require an oil pipeline to report its Composite Tax Rate Percentage.[25] The NOPR defined the Composite Tax Rate Percentage as the sum, adjusted consistent with Commission policy, of (a) the applicable state income tax rate and (b) a federal income tax rate. As filed on Page 700, the NOPR stated the Composite Tax Rate Percentage should reflect the income tax rate used pursuant to Commission policy to determine the Income Tax Allowance reported on line 8.

23. The NOPR surmised ''[t]he Composite Tax Rate Percentage will create a better understanding of the differential between an oil pipeline's Total Interstate Operating Revenues (line 10) and the oil pipeline's Total Cost of Service (line 9).'' [26] Specifically, the NOPR predicted the Composite Tax Rate Percentage may be used to determine the portion of this differential that is attributable to income taxes under Commission policy, and the

[18] A4A and NPGA Comments at 8.

[19] *Id.*

[20] 18 CFR Part 201 and 18 CFR Part 101 (2012), respectively.

[21] 18 CFR Part 352, Account 797—Form of Balance Sheet Statement—Stockholder's Equity (2012).

[22] NOPR, FERC Stats. & Regs. ¶ 32,692 at P 10.

[23] Return on Rate Base—Debt Component will be the equivalent of the weighted average cost of debt (product of proposed lines 6a and 6c) multiplied by the Trended Original Cost Rate Base (proposed line 5d).

[24] NOPR, FERC Stats. & Regs. ¶ 32,692 at P 11. *See also Inquiry Regarding Income Tax Allowances,* 111 FERC ¶ 61,139, at P 32 (2005) (The Commission's income tax policy permits ''an income tax allowance for all entities or individuals owning public utility assets, provided that entity or individual has an actual or potential income tax liability to be paid on that income from those assets.'').

[25] NOPR, FERC Stats. & Regs. ¶ 32,692 at P 11.

[26] *Id.* P 13.

portion that may be treated as part of an oil pipeline's actual return on equity.

2. Comments

24. Several entities filed comments. AOPL requests the Commission clarify what is represented by the Composite Tax Rate to be included in proposed line 8a (combined federal and state tax rate or something different). ConocoPhillips requests the Commission clarify how the income tax allowance reported on line 8 of the illustrative Page 700 provided as Appendix B to the NOPR was calculated.

25. A4A and NPGA request that the Commission provide guidance in its order that will ensure oil pipelines include a reasonably calculated income tax allowance on Page 700. A4A and NPGA note that the Commission may want to consider requiring the oil pipeline to report the income taxes associated with the collection of equity allowance for funds used during construction (AFUDC) depreciation as a separate row to allow parties to be able to more easily gauge the reasonableness of the Income Tax Allowance calculation, or alternatively, shippers can use 50 percent of the Adjusted Capital Structure ratio for Proprietary Capital (row 6b) as an imperfect proxy for the equity portion or share of the AFUDC depreciation reported in Line 3. A4A and NPGA also request that the Commission clarify how comparable rate of return comparisons should be performed.

3. Commission Determination

26. The Commission adopts the NOPR's proposal with AOPL's requested clarification. The Commission clarifies that what is represented by the Composite Tax Rate to be included in line 8a is the combined federal and state tax rate as adjusted consistent with Commission policy. The Commission simply seeks the tax rate that represents the amount of additional taxes the oil pipeline would be required to pay if it earned its exact weighted average cost of capital as reported on line 6e and it collected an additional dollar of revenue.

27. As to ConocoPhillips' request to show how the income tax allowance depicted on line 8 of the illustrative Page 700 provided in Appendix B was calculated, the Commission declines to do so. As ConocoPhillips' acknowledges, Appendix B was included merely for illustrative purposes and is not precedential.

28. Lastly, the Commission declines to require oil pipelines to report on a separate row the income taxes associated with the collection of equity AFUDC depreciation. There has been no showing the separate identification of this subcomponent of the total income tax allowance will enhance the usefulness of Page 700 in the preliminary screening process. Review of an oil pipeline's calculation of an income tax allowance is done in a ratemaking proceeding, and the additional data provided by the Final Rule is sufficient for a shipper or interested entity to use Page 700 as a preliminary screening tool.

E. Calculation of Actual Rate of Return on Equity

1. NOPR

29. The NOPR proposed modifications to Page 700 that will provide information that may be used to calculate an oil pipeline's actual rate of return on equity. The NOPR detailed that, for Page 700 purposes, the actual rate of return on equity is determined by dividing (a) the actual return on equity by (b) the equity portion of Trended Original Cost Rate Base reported on line 5d. The NOPR further pointed out for Page 700 purposes, the actual return on equity is the sum of three components that can be derived using the proposed modifications to Page 700: (a) the return on equity embedded in an oil pipeline's Page 700 Total Cost of Service (line 7b); (b) the difference, adjusted for taxes, between an oil pipeline's Total Interstate Operating Revenues (line 10) and an oil pipeline's Total Cost of Service (line 9); [27] and (c) the current year's inflation related earnings that are deferred for subsequent collection, e.g., the contribution to Net Deferred Earnings, which is calculated by multiplying the equity portion of the Trended Original Cost Rate Base (line 5d) by the current year's Department of Labor's consumer price index for all urban areas (CPI–U).

30. Once the actual return on equity has been derived, the NOPR suggested that for Page 700 purposes, it may be divided by the equity portion of TOC rate base. Finally, the NOPR stated the equity portion of the TOC rate base consists of the TOC rate base (proposed line 5d) multiplied by the equity component of capital structure (proposed line 6b).

2. Comments

31. AOPL requests that the Commission clarify that the methodology set forth in the NOPR for calculating the actual rate of return on equity will have no precedential effect, and that the proposed calculation is not intended to demonstrate whether oil pipeline rates are just and reasonable on the merits within the meaning of the ICA. AOPL points out, "the Commission has consistently emphasized the original, limited purpose of Page 700" in that Page 700 is only a "preliminary screening tool and is not to be used to demonstrate the justness and reasonableness of oil pipeline rates." [28] AOPL also observes the Commission has stated Form 6 "provide[s] sufficient information to allow shippers to file a complaint requesting a determination of the justness and reasonableness of an oil pipeline's rates." [29] Therefore, AOPL contends that shippers already have enough information with what is already available on Page 700.

32. AOPL argues Form 6 includes historic accounting data that (1) does not contain the forward-looking adjustments made during ratemaking; (2) may include non-recurring items that should be excluded for ratemaking purposes; and (3) might not properly reflect the allocation of overhead costs from parent to affiliated companies.[30]

33. AOPL further states it is concerned that the ratemaking formula discussed in the NOPR does not reflect Commission precedent and established ratemaking principles for oil pipelines.[31] For example, AOPL claims that in Opinion No. 351, the Commission found that the regulatory method for determining a company's return allowance is based on a weighted cost of capital applied to a single rate base, yet the NOPR purportedly references a separate debt and equity rate base component for purposes of computing an actual return on equity, which it claims is inconsistent with prior Commission findings. Likewise, AOPL disagrees with the statement that "the current year's contribution to Net Deferred Earnings represents equity return the carrier has collected in its current rates." [32] To this end, AOPL suggests that under the TOC methodology the current year's contribution to deferred earnings is not collected in the current period, but is instead accrued in rate base and amortized over the remaining life of the asset.

34. AOPL asserts that the additional information is not necessary or

[27] NOPR, FERC Stats. & Regs. ¶ 32,692 at P 14 and n.19.

[28] AOPL Comments at 4 and 12–13.

[29] AOPL Comments at 7 (citing *Review of FERC Form Nos. 6 and 6–Q,* Notice Terminating Proceeding, FERC Stats. & Regs. ¶ 35,561, at P 9 (2008)).

[30] *Id.* at 12.

[31] *Id.* at 18–20 (citing NOPR, FERC Stats. & Regs. ¶ 32,692 at PP 14–15).

[32] *Id.* at 19–20.

appropriate for ensuring that Page 700 can be used for its intended purpose of allowing a shipper to make a threshold determination as to whether to challenge an oil pipeline's rates. AOPL states that the proposed additional line items do not further the Commission's objective of ensuring that page 700 is a useful preliminary screening tool.

35. Mr. Gooch states that the NOPR's calculation of the actual return on equity allows for an income tax allowance prior to the calculation of a profit, to which Mr. Gooch strongly objects. Mr. Gooch states that consumers would essentially be paying the income taxes that might be incurred on unlawful and prohibited revenues, violating the ICA.

3. Commission Determination

36. The Commission will adopt the NOPR's use of a calculation of an actual rate of return on equity. As the NOPR reasoned, the actual rate of return on equity is particularly useful information when using Page 700 as a preliminary screen to evaluate whether additional proceedings may be necessary to challenge rates consistent with the Commission's mandate under the ICA.

37. The proposed formula for calculating the actual return on equity in the NOPR does not have precedential effect for ratemaking purposes nor does it demonstrate alone whether a pipeline's rates are just and reasonable. Consistent with the historic purpose of Page 700 as a preliminary screening tool, the Commission affirms the NOPR's method for calculating the actual rate of return on equity is for preliminary screening purposes only. The proposal does not establish a formula for setting oil pipeline rates in a particular rate case.

38. Accordingly, the calculation of the actual rate of return formula on Page 700 does not change the Commission's ratemaking policies. The Commission agrees with AOPL that Opinion No. 351 outlined how the total return on equity should be calculated for the purpose of setting oil pipeline rates.[33] Here, in contrast, the proposed calculation is for the calculation of an actual return on equity only. The Commission's actions in this Final Rule do not change the Commission's ratemaking policies in Opinion No. 351. Nor does the formula, which is for preliminary screening purposes only, alter the Commission's ratemaking policies regarding test period adjustments, net deferred earnings,[34] or the calculation of an oil pipeline's return. Nor do the changes to Page 700 alter the standards and burdens of proof applied by the Commission when it rules on complaints, petitions, or other requests for relief based on a full record and substantial evidence. Finally, the Commission emphasizes that the additions to Page 700 neither affect existing rates nor change any rate on file. Rather, the requested data provide the Commission and interested entities with information that will help them make a reasonable assessment of an oil pipeline's actual rate of return on equity for preliminary screening purposes at any particular time.

39. The Commission rejects Mr. Gooch's contention that the NOPR's calculation of the actual return on equity inappropriately adjusts for income taxes. The difference between an oil pipeline's Total Interstate Operating Revenues (line 10) and an oil pipeline's Total Cost of Service (line 9) may be subject to income taxes. Any portion of this differential attributable to income taxes is an expense and is not part of the return to the oil pipeline's owners. Thus, the NOPR correctly removed the portion attributable to income taxes from the calculation of the oil pipeline's actual return on equity.

40. In discussing the NOPR's estimate of an actual return on equity, AOPL states that Page 700 may not properly reflect the allocation of overhead costs from parent and affiliated companies.[35] The instructions to Page 700 state that reported information ''shall be computed consistent with the Commission's Opinion No. 154–B *et al.* methodology.'' The Commission expects Form 6 respondents to properly populate each entry to reflect Commission precedent.

F. Miscellaneous Recommendations

1. Comments

41. Commenters raised a number of additional issues. Mr. Gooch advocates compelling oil pipelines to report excess profits in footnotes to Page 700. Mr. Gooch also advocates that the oil pipelines be required to state, under oath, that all of their rates are just and reasonable under the Commission's definition.

42. All the commenters except AOPL advocate for companies that file Form 6 for multiple oil pipeline systems to file separate Page 700s for each segment, service, or rate schedule.[36] Similarly, several commenters advocate for the Commission to require oil pipelines to file or make available workpapers.[37] CAPP also asked the Commission to clarify the relationship between the entity that files Page 700 and the oil pipeline services for which a return on equity is intended to be generated. A4A and NPGA also request that the Commission require oil pipelines to file Form 6 before they can file for an index rate increase.[38] Valero requests that Page 700 be amended to include Jurisdictional Allowance Oil Revenue, storage, demurrage revenue, rental revenue, and incidental revenue. Valero also requests that an oil pipeline identify and justify the exclusion of any such revenue as non-jurisdictional.[39]

43. Parties also raised issues not involving Form 6. For example, Mr. Gooch raises issues related to alleged over-recoveries by certain oil pipelines.[40] A4A and NPGA as noted above request that the Commission require oil pipelines to file Form 6 before they can file for an index rate increase; they also ask that the interest rate applicable to refunds and reparations reflect the oil pipeline's rate of return as reported on page 700.[41]

44. In its reply comments, AOPL objects that many of the comments are beyond the scope of the NOPR. AOPL adds that many of the proposed revisions have been raised in other proceedings such as (1) proposals to segregate Form 6 and Page 700 data by oil pipeline system and (2) proposals to require oil pipelines to file their Page 700 workpapers with Form 6, and the Commission has rejected them.[42] As to the proposals to add workpapers, AOPL further suggests that the commenters have not raised any new arguments and the Commission should again reject the proposals.[43] Finally, AOPL asks the

[33] Opinion No. 351–A, 53 FERC at 62,388–89. The Commission clarified the Opinion No. 154–B methodology for calculating a total return for oil pipeline ratemaking purposes in Opinion No. 351.

[34] In a rate proceeding to set oil pipeline rates, the Commission recognizes that the inflation related return is earned in the current period but the collection thereof is deferred to later periods through an amortization process over the remaining life of an oil pipeline. This is similar to the calculation of a regulatory asset, which may be recognized for financial purposes in the current period but included in rate base and collected over the life of the asset for ratemaking purposes.

[35] AOPL Comments at 13–15.

[36] CAPP Comments at 4; A4A and NPGA Comments at 15–23; Valero Comments at 21–24; ConocoPhillips Comments at 3–4; Suncor Comments at 2–3; and BP Comments at 2–3.

[37] A4A and NPGA Comments at 24; and ConocoPhillips Comments at 4.

[38] A4A and NPGA Comments at 25.

[39] Valero Comments at 11–16. In its reply comments, Suncor requests that the Commission amend line 10 of Page 700 as Valero suggests. Suncor Reply Comments at 3.

[40] Mr. Gooch Comments at 1–8.

[41] A4A and NPGA Comments at 23–26.

[42] AOPL Reply Comments at 8–22.

[43] *Id.* at 24–26.

Commission to reject Valero's proposed changes because Valero is attempting to relitigate the outcomes of previous index rate proceedings.[44]

2. Commission Determination

45. In this Final Rule, the Commission modifies Page 700 to require entities to provide additional information regarding rate base, rate of return, return on rate base, and income tax allowance on Page 700. These revisions provide increased transparency and information to assist the Commission and the public in calculating an oil pipeline's return on equity for preliminary screening purposes. Given the limited nature of the NOPR, the Commission is not adopting additional changes to Form 6, such as the segregation of data or changing Commission policy to make available oil pipeline cost-of-service workpapers. Other issues, such as the Commission's indexing policies, may be addressed as they arise in actual proceedings.

G. Conclusion

46. As discussed herein, the proposed modifications will facilitate the calculation of the actual rate of return on equity based upon Page 700 data. The actual rate of return on equity is particularly useful information when using Page 700 to conduct a preliminary evaluation of an oil pipeline's rates. The additional information proposed to be reported will impose almost no additional burden on oil pipelines because oil pipelines already must develop cost of service supporting the information reported on Page 700.

H. Effective Date

47. The changes to Form 6 are to be effective for reporting in the 2013 Form 6. The 2013 Form 6 must be filed on or before April 18, 2014.[45] The new schedule appearing on Page 700 therefore will be required for Form 6 filings as of April 18, 2014, for the reporting year ending December 31, 2013.

V. Information Collection Statement

A. The NOPR

48. In the NOPR, in accordance with the Paperwork Reduction Act and the requirements of the Office of Management and Budget (OMB), the Commission solicited comment on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques.[46] The Commission also informed respondents that they will not be penalized for failing to respond to this collection of information unless the collection displays a valid OMB control number.

49. The Commission estimated the additional average annual Public Reporting cost imposed on oil pipelines providing interstate services related to this Final Rule to be $3,037.[47] The Commission estimated the additional Public Reporting Burden related to this Final Rule for the recurring effort involved in filing the data on proposed lines 5a–5c, 6a–6e, 7a–7c, and 8a of Page 700 for 2013 and future years, to be 0.5 hours per year per respondent. The Commission estimated there are 153 filers that will be affected each year by the change in filing requirements.[48] The number of filers is reduced from 166 to 153 through 2012 filers and exclusion of TAPS oil pipelines.

B. Comments

50. No entity directly commented on the Commission's initial burden estimates that were included in the NOPR.

C. Commission Determination

51. The Commission has reviewed the burdens imposed by this Final Rule. The Commission did not impose any additional filing requirements as proposed by various commenters to require the oil pipelines to file additional information beyond that included in the NOPR. The additional lines included in the NOPR and Final Rule are needed steps to calculate information already reported in the Form 6. Therefore, there is no additional Public Reporting Burden associated with the Final Rule. The Commission's estimate of the Public Reporting Burden imposed on oil pipelines by this Final Rule is the same as shown in the NOPR and copied in the table below.

RM12–18–000, FERC Form 6	Annual number of filers	Estimated additional burden per filer (hr.)	Total estimated additional burden (hr.)	Estimated additional cost per filer ($)[49]	Total estimated additional cost ($)
Filing new proposed lines on page 700	153	0.5	77	$34.51	$2,657.88

Title: FERC Form 6, Annual Report of Oil Pipeline Companies.

Action: Revisions to the FERC Form 6.

OMB Control No: 1902–0022.

Respondents: Oil pipelines.

Frequency of Responses: Annual.

Necessity of the Information: This action ensures the availability of data consistent with the Commission's obligation to regulate interstate oil and petroleum product oil pipeline rates and the intent of Page 700, to enable the Commission and shippers to monitor and analyze interstate oil pipeline costs.

Internal Review: The Commission has reviewed the changes and has determined that the changes are necessary. These requirements conform to the Commission's need for efficient and sufficient information collection, communication, and management with regard to the oil pipeline sector of the energy industry. The Commission has, by means of internal review, assured itself that there is specific, objective support for the burden estimates associated with the information collection requirements.

Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director, email: *DataClearance@ferc.gov,* Phone: (202) 502–8663, fax: (202) 273–0873]. Comments on the requirements of this

[44] *Id.* at 24.

[45] 18 CFR 357.1.

[46] NOPR, FERC Stats. & Regs. ¶ 32,692 at P 20.

[47] *Id.*

[48] The TAPS oil pipelines are exempt from filing Page 700. Section 1804(2)(B) of the Energy Policy Act of 1992 excludes from the provisions of the Act, for ratemaking purposes, TAPS and any oil pipeline delivering oil directly or indirectly to TAPS. Therefore, the Commission exempted the TAPS entities from having to submit the information required on Page 700. Order No. 571, FERC Stats. & Regs. ¶ 31,006 at 31,175.

[49] Based on an estimated average cost per employee for 2012 (including salary plus benefits) of $143,540, the estimated average hourly cost per employee is $69.01. The average work year is 2,080 hours.

rule may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. For security reasons, comments should be sent by email to OMB at *oira_submission@omb.eop.gov*. Please reference OMB Control No. 1902–0022, FERC–6 and the docket number of this rulemaking in your submission.

VI. Environmental Analysis

52. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment. The actions taken here fall within categorical exclusions in the Commission's regulations for information gathering, analysis, and dissemination.[50] Therefore, an environmental assessment is unnecessary and has not been prepared in this rulemaking.

VII. Regulatory Flexibility Act

53. The Regulatory Flexibility Act of 1980 (RFA) generally requires agencies to prepare certain statements, descriptions, and analyses of proposed rules that will have a significant economic impact on a substantial number of small business entities.[51] Agencies are not required to make such an analysis if a rule would not have such an effect.

54. The Commission does not believe that this Final Rule will have an adverse impact on small entities, nor will it impose upon them any significant costs of compliance. The Commission identified 29 small entities as respondents to the requirements in the Final Rule.[52] As explained above, the Commission estimates that the change to Page 700 will increase the paperwork burden of preparing Page 700 by approximately $34.51 per respondent. The Commission does not estimate that there are any other regulatory burdens associated with this rule. Therefore the Commission certifies that the proposed rule will not have a significant impact on a substantial number of small entities. Accordingly, no regulatory flexibility analysis is required.

[50] 18 CFR 380.4(a)(5).

[51] 5 U.S.C. 601–12.

[52] The RFA definition of small entity refers to the definition provided in the Small Business Act, which defines a small business concern as a business that is independently owned and operated and that is not dominant in its field of operation. 15 U.S.C. 632. The Small Business Size Standards component of the North American Industry Classification System defines a small oil pipeline company as one with less than 1,500 employees. *See* 13 CFR 121.201.

VIII. Document Availability

55. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington DC 20426.

56. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

57. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov*.

IX. Effective Date and Congressional Notification

58. In the NOPR the Commission proposed that the changes to Form 6 to be effective for reporting in the 2013 FERC Form No. 6. The 2013 Form 6 must be filed on or before April 18, 2014.[53] The new schedule appearing on Page 700 therefore would not be required for Form 6 filings until April 18, 2014, for the reporting year ending December 31, 2013. The Final Rule is effective sixty (60) days after the rule is published in the **Federal Register**.

59. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB that this rule is not a major rule as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

[53] 18 CFR 357.2(b)(2).

By the Commission.

Kimberly D. Bose,

Secretary.

Note: Appendix A will not be published in the *Code of Federal Regulations*.

Appendix A—Summary of Proposed Changes to FERC Form 6, Page 700

Line 5a is added to read as follows:
Rate Base—Original Cost

Line 5b is added to read as follows:
Rate Base—Unamortized Starting Rate Base Write-Up

Line 5c is added to read as follows:
Rate Base—Accumulated Net Deferred Earnings

Line 5d is added to read as follows:
Total Rate Base—Trended Original Cost—(line 5a + line 5b + line 5c)

Line 6a is added to read as follows:
Rate of Return—Adjusted Capital Structure Ratio for Long Term Debt

Line 6b is added to read as follows:
Rate of Return—Adjusted Capital Structure Ratio for Stockholders' Equity

Line 6c is added to read as follows:
Rate of Return—Cost of Long Term Debt Capital

Line 6d is added to read as follows:
Rate of Return—Real Cost of Stockholders' Equity

Line 6e is added to read as follows:
Rate of Return—Weighted Average Cost of Capital—(line 6a × line 6c + line 6b × line 6d)

Line 7 is edited to read as follows:
Return on Trended Original Cost Rate Base

Line 7a is added to read as follows:
Return on Rate Base—Debt Component—(line 5d × line 6a × line 6c)

Line 7b is added to read as follows:
Return on Rate Base—Equity Component—(line 5d × line 6b × line 6d)

Line 7c is added to read as follows:
Total Return on Rate Base—(line 7a + line 7b)

Line 8a is added to read as follows:
Composite Tax Rate % (37.50%–37.50)

Note: Appendix B will not be published in the *Code of Federal Regulations.*

Appendix B: Revised Page 700 to Form 6

BILLING CODE 6717–01–P

Name of Respondent	This Report Is: □ (1) An Original □ (2) A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of ________

Annual Cost of Service Based Analysis Schedule

1.) Use footnotes when particulars are required or for any explanations.
2.) Enter on lines 1-9, columns (b) and (c), the value the respondent's Operating & Maintenance Expenses, Depreciation Expense, AFUDC Depreciation, Amortization of Deferred Earnings, Rate Base, Rate of Return, Return, Income Tax Allowance, and Total Cost of Service, respectively, for the end of the current and previous calendar years. The values shall be computed consistent with the Commission's Opinion No. 154-B et al. methodology. Any item(s) not applicable to the filing, the oil pipeline company shall report nothing in columns (b) and (c).
3.) Enter on line 10, columns (b) and (c), total interstate operating revenue, as reported on page 301, for the current and previous calendar years.
4.) Enter on line 11, columns b and c, the interstate throughput in barrels for the current and previous calendar years.
5.) Enter on line 12, columns b and c, the interstate throughput in barrel-miles for the current and previous calendar years.
6.) If the company makes major changes to its application of the Opinion No. 154-B et al. methodology, it must describe such changes in a footnote, and calculate the amounts in columns (b) and (c) of lines No. 1-12 using the changed application.
7.) A respondent may be requested by the Commission or its staff to provide its workpapers which support the data reported on page 700.

Line No.	Item (a)	Current Year Amount (in dollars) (b)	Prior Year Amount (in dollars) (c)
1	Operating and Maintenance Expenses	25,000,000	24,500,000
2	Depreciation Expense	6,500,000	6,450,000
3	AFUDC Depreciation	500,000	510,000
4	Amortization of Deferred Earnings	800,000	840,000
5	Rate Base		
5a	Rate Base – Original Cost	90,000,000	94,000,000
5b	Rate Base – Unamortized Starting Rate Base Write-Up		
5c	Rate Base – Accumulated Net Deferred Earnings	20,000,000	21,000,000
5d	Total Rate Base –Trended Original Cost – (line 5a + line 5b + line 5c)	110,000,000	115,000,000
6	Rate of Return % (10.25% - 10.25)		
6a	Rate of Return – Adjusted Capital Structure Ratio for Long Term Debt	36.00	36.00
6b	Rate of Return – Adjusted Capital Structure Ratio for Stockholders' Equity	64.00	64.00
6c	Rate of Return – Cost of Long Term Debt Capital	8.00	8.00
6d	Rate of Return – Real Cost of Stockholders' Equity	14.25	14.25
6e	Rate of Return – Weighted Average Cost of Capital – (line 6a x line 6c + line 6b x line 6d)	12.00	12.00
7	Return on Trended Original Cost Rate Base		
7a	Return on Rate Base – Debt Component – (line 5d x line 6a x line 6c)	3,168,000	3,312,000
7b	Return on Rate Base – Equity Component – (line 5d x line 6b x line 6d)	10,032,000	10,488,000
7c	Total Return on Rate Base – (line 7a + line 7b)	13,200,000	13,800,000
8	Income Tax Allowance	9,000,000	9,400,000
8a	Composite Tax Rate % (37.50% - 37.50)	37.50	37.50
9	Total Cost of Service	55,000,000	55,500,000
10	Total Interstate Operating Revenues	60,000,000	57,000,000
11	Total Interstate Throughput in Barrels	80,000,000	79,000,000
12	Total Interstate Throughput in Barrel-Miles	40,000,000,000	39,000,000,000

FERC Form No. 6 (REV 12/12) **Page 700**

[FR Doc. 2013–17729 Filed 7–23–13; 8:45 am]

BILLING CODE 6717–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510, 522, and 524

[Docket No. FDA–2013–N–0002]

New Animal Drugs; Change of Sponsor; Fentanyl; Iron Injection

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor for two approved new animal drug applications (NADAs) from Alstoe, Ltd., Animal Health, to Sogeval S.A., and a change of sponsor for an NADA from Nexcyon Pharmaceuticals, Inc. to Elanco Animal Health, A Division of Eli Lilly & Co.

DATES: This rule is effective July 24, 2013.

FOR FURTHER INFORMATION CONTACT: Steven D. Vaughn, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7520 Standish Pl., Rockville, MD 20855, 240–276–8300, email: *steven.vaughn@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Alstoe, Ltd., Animal Health, Pera Innovation Park, Nottingham Rd., Melton Mowbray, Leicestershire, England LE13 0PB has informed FDA that it has transferred ownership of, and all rights and interest in, NADA 099–667 for IMPOSIL (iron dextran complex) Injection and NADA 110–399 for GLEPTOSIL (gleptoferron) Injection to Sogeval S.A., 200 Avenue de Mayenne, 53000 Laval, France. Nexcyon Pharmaceuticals, Inc., 644 W. Washington Ave., Madison, WI 53703 has informed FDA that it has transferred ownership of, and all rights and interest in, NADA 141–337 for RECUVYRA (fentanyl) Transdermal Solution to Elanco Animal Health, A Division of Eli Lilly & Co., Lilly Corporate Center, Indianapolis, IN 46285. Accordingly, the Agency is amending the regulations in 21 CFR parts 522 and 524 to reflect the transfers of ownership.

Following these changes of sponsorship, Alstoe, Ltd., Animal Health, and Nexcyon Pharmaceuticals, Inc., are no longer sponsors of approved NADAs. Accordingly, FDA is amending 21 CFR 510.600 to remove the entries for these firms.

In addition, Sogeval S.A. is now a sponsor of approved NADAs. Accordingly, FDA is amending 21 CFR 510.600 to add entries for this firm.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Parts 522 and 524

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510, 522, and 524 are amended as follows:

PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

■ 2. In the table in paragraph (c)(1) of § 510.600, remove the entries for ''Alstoe, Ltd., Animal Health'' and ''Nexcyon Pharmaceuticals, Inc.'', and alphabetically add an entry for ''Sogeval S.A.''; and in the table in paragraph (c)(2), remove the entries for ''050929'' and ''062408'', and numerically add an entry for ''059120'' to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

* * * * *

(c) * * *

(1) * * *

Firm name and address	Drug labeler code
* * * * *	
Sogeval S.A., 200 Avenue de Mayenne, 53000 Laval, France	059120
* * * * *	

(2) * * *

Drug labeler code	Firm name and address
* * * * *	
059120	Sogeval S.A., 200 Avenue de Mayenne, 53000 Laval, France.
* * * * *	

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 3. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

§ 522.1182 [Amended]

■ 4. In § 522.1182, in paragraphs (b)(3) and (b)(8), remove ''062408'' and in its place add ''059120''.

PART 524—OPHTHALMIC AND TOPICAL DOSAGE FORM NEW ANIMAL DRUGS

■ 5. The authority citation for 21 CFR part 524 continues to read as follows:

Authority: 21 U.S.C. 360b.

§ 524.916 [Amended]

■ 6. In paragraph (b) of § 524.916, remove ''050929'' and in its place add ''000986''.

Dated: July 17, 2013.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. 2013–17754 Filed 7–23–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2013–0636]

RIN 1625–AA00

Safety Zone; Metedeconk River; Brick Township, NJ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is temporarily changing the enforcement date of a safety zone for one recurring fireworks display in the Fifth Coast Guard District. This regulation applies to only one recurring fireworks event held in the Metedeconk River in Brick Township, NJ. The fireworks display is normally held on the first Thursday in September, but this year it will be held on July 25th. The safety zone is necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic in a portion of Delaware River near Philadelphia, Pennsylvania, during the event.

DATES: This rule is effective from 6:30 p.m. on July 25, 2013 through September 5, 2013. Within the Coast Guard Sector Delaware Bay-COTP Zone portion of the table in 33 CFR 165.506, an entry 19 for the Metedeconk River, Brick Township, NJ Safety Zone will be added from 6:30 p.m. until 10 p.m. on July 25, 2013, and existing entry 9 will be suspended on September 5, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2013–0636]. 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 Lieutenant Veronica Smith, U.S. Coast Guard Sector Delaware Bay, Chief of Waterways Management Division; telephone (215) 271–4851, email *veronica.l.smith@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 temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(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 is impracticable. Publishing an NPRM is impracticable given that the necessary information for this event were not received by the Coast Guard with insufficient time remaining to issue an NPRM. Immediate action is necessary to provide for the safety of life and property in the navigable water. Delaying this rule to wait for a notice and comment period to run would inhibit the Coast Guard's ability to protect the public from the hazards associated with this maritime fireworks display.

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.** Delaying the establishment of the safety zone is impracticable and contrary to the public interest. Delay could result in mariners approaching the fireworks location, creating a hazardous scenario with potential for loss of life and property. For the same reasons discussed in the preceding paragraph, a 30 day notice period would be impracticable and contrary to the public interest.

B. Basis and Purpose

Recurring fireworks displays are frequently held on or adjacent to the navigable waters within the boundary of the Fifth Coast Guard District. For a description of the geographical area of each Coast Guard Sector—Captain of the Port (COTP) Zone, please see 33 CFR 3.25.

The regulation listing annual fireworks displays within the Fifth Coast Guard District and safety zones locations is 33 CFR 165.506. The Table to § 165.506 identifies fireworks displays by COTP zone, with the COTP Delaware Bay zone listed in section ''(a)'' of the Table.

Township of Brick sponsors an annual fireworks display held on the first Thursday in September over the waters of the Metedeconk River, Brick Township, New Jersey. The Table to § 165.506, at section (a) event number ''9'', describes the enforcement date and regulated location for this fireworks event.

In the Table, this fireworks display occurs annually on the first Thursday in September. However, this year, the fireworks event will be held on July 25, 2013.

A fleet of spectator vessels are anticipated to gather nearby to view the fireworks display. Due to the need for vessel control during the fireworks display, vessel traffic will be temporarily restricted to provide for the safety of participants, spectators and transiting vessels. Under provisions of 33 CFR 165.506, during the enforcement period, vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander.

C. Discussion of the Final Rule

The Coast Guard will temporarily suspend the regulation listed in Table to § 165.506, section (a) event Number ''9'', and insert this temporary regulation at Table to § 165.506, at section (a.) as event Number ''19'', in order to reflect that the safety zone will be effective and enforced from 6:30 p.m. until 10 p.m. on July 25, 2013. This change is needed to accommodate the sponsor's event plan. No other portion of the Table to § 165.506 or other provisions in § 165.506 shall be affected by this regulation.

The regulated area of this safety zone includes all the waters of the Metedeconk River within a 300 yard radius of the fireworks launch platform in approximate position latitude 40°03′24″ N, longitude 074°06′42″ W, near the shoreline at Brick Township, NJ.

This safety zone will restrict general navigation in the regulated area during the fireworks event. 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. The regulated area is needed to control vessel traffic during the event for the safety of participants and transiting vessels.

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 so mariners can adjust their plans accordingly.

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 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.

This rule prevents traffic from transiting a portion of the Metedeconk River, in Brick Township, New Jersey during the specified event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via marine information broadcasts, local radio stations and area newspapers so that mariners can adjust their plans accordingly. Additionally, this rulemaking changes the enforcement date for the Metedeconk River, Brick Township, New Jersey fireworks demonstration for July 25, 2013 only and does not change the permanent enforcement period that has been published in 33 CFR 165.506, Table to § 165.506 at section (a), event Number ''9''. In some cases vessel traffic may be able to transit the regulated area 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 rule will not have a significant economic impact on a substantial number of small entities.

This rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in the Metedeconk River, in Brick Township, New Jersey, where fireworks events are being held. This regulation will not have a significant impact on a substantial number of small entities because it will be enforced only during the fireworks display event that has been permitted by the Coast Guard Captain of the Port. The Captain of the Port will ensure that small entities are able to operate in the regulated area when it is safe to do so. In some cases, vessels will be able to safely transit around the regulated area at various times, and, with the permission of the Patrol Commander, vessels may transit through the regulated area. Before the enforcement period, the Coast Guard 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 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 safety zone. 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.**

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. In § 165.506, amend the Table to § 165.506 under the heading (a) Coast Guard Sector Delaware Bay—COTP Zone by—

■ a. Suspending entry 9, ''Metedeconk River, Brick Township, NJ Safety Zone'' on September 5, 2013.

■ b. Adding entry 19 from 6:30 p.m. until 10 p.m. on July 25, 2013, to read as follows:

§ 165.506 Safety Zones; Fireworks Displays in the Fifth Coast Guard District.

* * * * *

Number	Date	Location	Regulated area
(a) Coast Guard Sector Delaware Bay—COTP Zone			
*	*	*	* * * *
19	July 25th	Metedeconk River, Brick Township, NJ, Safety Zone.	The waters of the Metedeconk River within a 300 yard radius of the fireworks launch platform in approximate position latitude 40°03′24″ N, longitude 074°06′42″ W, near the shoreline at Brick Township, NJ.

* * * * *

Dated: July 11, 2013.

K. Moore,

Captain, U.S. Coast Guard, Captain of the Port, Delaware Bay.

[FR Doc. 2013–17677 Filed 7–23–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2013–0611]

RIN 1625–AA00

Safety Zone; Joint Operations Exercise, Lake Michigan, IL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on Lake Michigan near Lake Forest, IL. This safety zone is intended to restrict vessels from a portion of Lake Michigan due to a joint operations exercise involving the Department of Defense and the Department of Homeland Security. This temporary safety zone is necessary to protect the surrounding public and vessels from the hazards associated with the exercise.

DATES: This rule is effective from 12 p.m. until 11:59 p.m. on July 25, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2013–0611. 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 temporary rule, contact or email MST1 Joseph McCollum, U.S. Coast Guard Sector Lake Michigan, at 414–747–7148 or *Joseph.P.McCollum@uscg.mil*. If you have questions on viewing the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
DOD Department of Defense
FR Federal Register
NPRM Notice of Proposed Rulemaking
TFR Temporary Final Rule

A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM with respect to this rule because doing so would be impracticable. The final details for this event were not known to the Coast Guard until there was insufficient time remaining before the event to publish an NPRM. Thus, delaying the effective date of this rule to wait for a comment period to run would be impracticable because it would inhibit the Coast Guard's ability to protect persons and vessels from the hazards associated with a joint DHS/DOD exercise, which are discussed further below.

Under 5 U.S.C. 553(d)(3), The Coast Guard finds that good cause exists for making this temporary rule effective less than 30 days after publication in the **Federal Register**. For the same reasons discussed in the preceding paragraph, waiting for a 30 day notice period to run would be impracticable and contrary to the public interest.

B. Basis and Purpose

The legal basis for the rule is the Coast Guard's authority to establish regulated navigation areas and limited access areas: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

On July 25, 2013, personnel and vessels from the Coast Guard and the Department of Defense will participate in a joint exercise involving parachuting personnel over the waters of Lake Michigan, approximately 9.5 nautical miles east of Lake Forest, IL. Coast Guard and DOD vessels are expected to maneuver over a 2 nautical mile section of Lake Michigan in an effort to recover and otherwise aid the personnel in parachutes. The Captain of the Port, Lake Michigan, has determined that parachuting personnel, and the military vessels maneuvering to aid in their recovery, presents a significant risk to public safety and property. Such hazards include collisions among transiting civilian and military vessels, and collisions among parachuting personnel and transiting watercraft.

C. Discussion of the Final Rule

With the aforementioned hazards in mind, the Captain of the Port, Lake Michigan, has determined that this temporary safety zone is necessary to ensure the safety of persons and vessels during the exercise. This zone will be effective and enforced from 12 p.m. until 11:59 p.m. on July 25, 2013. This zone will encompass all waters of Lake Michigan within a 2 Nautical Mile radius of an approximate position at 42°15′01″ N, 87°36′0″ W (NAD 83).

Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the

Port, Lake Michigan, or his designated on-scene representative. The Captain of the Port or his designated on-scene representative may be contacted via VHF Channel 16.

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. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security.

We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone created by this rule will be in an offshore location and enforced for only one day in July. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the Captain of the Port.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this temporary rule on small entities. 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 will affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in a portion of Lake Michigan near Lake Forest, IL on July 25, 2013.

This safety zone will not have a significant economic impact on a substantial number of small entities for the reasons cited in the *Regulatory Planning and Review* section. Additionally, before the enforcement of the zone, we would issue local Broadcast Notice to Mariners so vessel owners and operators can plan 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** section 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 INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

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 safety zone and, therefore it 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**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapters 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.T09–0611 to read as follows:

§ 165.T09–0611 Safety Zone; Joint Operations Exercise, Lake Michigan, Illinois.

(a) *Location.* All waters of Lake Michigan within a 2 Nautical Mile radius of an approximate position at 42°15′01″ N, 87°36′0″ W (NAD 83).

(b) *Effective and enforcement period.* This rule is effective and will be enforced from 12 p.m. until 11:59 p.m. on July 25, 2013.

(c) *Regulations.* (1) In accordance with the general regulations in section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port, Lake Michigan or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port, Lake Michigan or his designated on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port, Lake Michigan is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port, Lake Michigan to act on his behalf.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port, Lake Michigan or his on-scene representative to obtain permission to do so. The Captain of the Port, Lake Michigan or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port, Lake Michigan, or his on-scene representative.

Dated: July 16, 2013.

M.W. Sibley,

Captain, U.S. Coast Guard, Captain of the Port, Lake Michigan.

[FR Doc. 2013–17912 Filed 7–22–13; 4:15 pm]

BILLING CODE 9110–04–P

POSTAL SERVICE

39 CFR Part 501

Notice of Organization Name and Address Change

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is revising the rules concerning authorization to manufacture and distribute postage evidencing systems to reflect that the Office of Postage Technology Management is now known as Payment Technology and has a new mailing address.

DATES: *Effective date:* July 24, 2013.

FOR FURTHER INFORMATION CONTACT: Marlo Kay Ivey, Business Programs Specialist, Payment Technology, United States Postal Service, at 202–268–7613.

SUPPLEMENTARY INFORMATION: The United States Postal Service® (USPS®) has undergone a redesign. In that process, the Office of Postage Technology Management (PTM) was renamed Payment Technology (PT) and is now under the direction of the office of the Vice President of Mail Entry and Payment Technology, within the purview of the Chief Information Officer. In addition, since the relocation of its physical office, Payment Technology has a new mailing address.

List of Subjects in 39 CFR Part 501

Administrative practice and procedure.

Accordingly, for the reasons stated in the preamble, the Postal Service amends 39 CFR part 501 as follows:

PART 501—AUTHORIZATION TO MANUFACTURE AND DISTRIBUTE POSTAGE EVIDENCING SYSTEMS

■ 1. The authority citation for 39 CFR part 501 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 410, 2601, 2605, Inspector General Act of 1978, as amended (Pub. L. 95–452, as amended); 5 U.S.C. App. 3.

■ 2. In § 501.2, revise paragraph (g) to read as follows:

§ 501.2 Postage Evidencing System provider authorization.

* * * * *

(g) The Postal Service office responsible for administration of this part is the Office of Payment Technology (PT) or successor organization. All submissions to the Postal Service required or invited by this part are to be made to this office in person or via mail to 475 L'Enfant Plaza SW., Room 3500, Washington DC 20260–0004.

■ 3. In § 501.6, revise paragraphs (c)(1)–(3) and (e) to read as follows:

§ 501.6 Suspension and revocation of authorization.

* * * * *

(c) * * *

(1) Upon determination by the Postal Service that a provider is in violation of provisions of this part, or that its Postal Evidencing System poses an unreasonable risk to postal revenue, PT, acting on behalf of the Postal Service, shall issue a written notice of proposed suspension citing the specific conditions or deficiencies for which suspension of authorization to manufacture and/or distribute a specific Postage Evidencing System or class of Postage Evidencing Systems may be imposed. Except in cases of willful violation, the provider shall be given an opportunity to correct deficiencies and achieve compliance with all requirements within a time limit corresponding to the potential risk to postal revenue.

(2) In cases of willful violation, or if the Postal Service determines that the provider has failed to correct cited deficiencies within the specified time limit, PT shall issue a written notice of suspension setting forth the facts and reasons for the decision to suspend, and the effective date if a written defense is not presented as provided in paragraph (d) of this section.

(3) The notice shall also advise the provider of its right to file a response under paragraph (d) of this section. If a written response is not presented in a timely manner the suspension may go into effect. The suspension shall remain in effect for ninety (90) calendar days unless revoked or modified by PT.

* * * * *

(e) After receipt and consideration of the defense, PT shall advise the provider of its decision, and the facts and reasons for it. The decision shall be effective upon receipt unless it provides otherwise. The decision shall also advise the provider that it may be appealed within thirty (30) calendar days of receipt (unless a shorter time frame is deemed necessary). If an appeal is not filed in a timely manner, the decision of PT shall become a final decision of the Postal Service. The appeal may be filed with the Chief Information Officer of the Postal Service and must include all supporting evidence and state with specificity the reasons the provider believes that the decision is erroneous. The decision of the Chief Information Officer shall constitute a final decision of the Postal Service.

* * * * *

■ 4. In § 501.7, revise paragraph (a) to read as follows:

§ 501.7 Postage Evidencing System requirements.

(a) A Postage Evidencing System submitted to the Postal Service for approval must meet the requirements of the Intelligent Mail Indicia Performance Criteria published by PT. Copies of the current Performance Criteria may be requested via mail to the address in § 501.2(g).

* * * * *

■ 5. In § 501.8, revise paragraph (a) to read as follows:

§ 501.8 Postage Evidencing System test and approval.

(a) To receive Postal Service approval, each Postage Evidencing System must be submitted by the provider and evaluated by the Postal Service in accordance with the Postage Evidencing Product Submission Procedures published by PT. Copies of the current Performance Criteria may be requested via mail to the address in § 501.2(g). These procedures apply to all proposed Postage Evidencing Systems regardless of whether the provider is currently authorized by the Postal Service to distribute Postage Evidencing Systems. All testing required by the Postal Service will be an expense of the provider.

* * * * *

■ 6. Revise § 501.10 to read as follows:

§ 501.10 Postage Evidencing System modifications.

(a) An authorized provider must receive prior written approval from the manager, PT, of any and all changes made to a previously approved Postage Evidencing System. The notification must include a summary of all changes made and the provider's assessment as to the impact of those changes on the security of the Postage Evidencing System and postage funds. Upon receipt of the notification, PT will review the summary of changes and make a decision regarding the need for the following:

(1) Additional documentation.

(2) Level of test and evaluation required.

(3) Necessity for evaluation by a laboratory accredited by the National Institutes of Standards and Technology (NIST) under the National Voluntary Laboratory Accreditation Program (NVLAP).

(b) Upon receipt and review of additional documentation and/or test results, PT will issue a written acknowledgement and/or approval of the change to the provider.

■ 7. In § 501.12, revise paragraph (d) to read as follows:

§ 501.12 Administrative sanctions.

* * * * *

(d) After receipt and consideration of the defense, the Postal Service shall advise the provider of the decision, and the facts and reasons for it; the decision shall be effective upon receipt unless it provides otherwise. The decision shall also advise the provider that it may, within thirty (30) calendar days of receiving written notice, appeal that determination to the Chief Information Officer of the Postal Service, who shall issue a written decision upon the appeal, which will constitute the final Postal Service decision.

* * * * *

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–17712 Filed 7–23–13; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2013–0223; FRL–9837–2]

Approval and Promulgation of Implementation Plans: Atlanta, Georgia 1997 8-Hour Ozone Nonattainment Area; Reasonable Further Progress Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to the receipt of an adverse comment, EPA is withdrawing the May 29, 2013, direct final rule to approve Georgia's October 21, 2009, state implementation plan (SIP) submission to address the reasonable further progress (RFP) plan requirements for the Atlanta, Georgia 1997 8-hour ozone national ambient air quality standards (NAAQS) nonattainment area. EPA is considering this comment and will address the comment in a subsequent action. EPA will not institute a second comment period on this action.

DATES: The direct final rule published at 78 FR 32135 on May 29, 2013, is withdrawn as of July 24, 2013.

FOR FURTHER INFORMATION CONTACT: Sara Waterson, Air Planning Branch, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Phone number: (404) 562–9061; Email: *waterson.sara@epa.gov*.

SUPPLEMENTARY INFORMATION: On May 29, 2013 (78 FR 32135), EPA published a direct final rulemaking to approve Georgia's October 21, 2009, SIP submission to address the RFP plan requirements for the Atlanta, Georgia 1997 8-hour ozone NAAQS nonattainment area. In the direct final rule, EPA stated that if adverse comments were received by June 28, 2013, the rule would be withdrawn and not take effect. On June 28, 2013, EPA received a comment. EPA interprets this comment as adverse and, therefore, EPA is withdrawing a portion of the direct final rule. EPA will address the comment in a subsequent final action based upon the proposed rulemaking action, also published on May 29, 2013 (78 FR 32222). EPA will not institute a second comment period on this action.

List of Subjects in 40 CFR Part 52

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

Dated: July 12, 2013.

Beverly H. Banister,

Acting Regional Administrator, Region 4.

■ Accordingly, the direct final rule which published in the **Federal Register** on May 29, 2013, at 78 FR 32135 is withdrawn as of July 24, 2013.

[FR Doc. 2013–17689 Filed 7–23–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2012–0419; FRL–9390–2]

Imazosulfuron; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of imazosulfuron in or on the melon subgroup 9A and the tuberous and corm subgroup 1C. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective July 24, 2013. Objections and requests for hearings must be received on or before September 23, 2013, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2012–0419, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Lois Rossi, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2012–0419 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before September 23, 2013. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2012–0419, by one of the following methods:

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

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of August 22, 2012 (77 FR 50661) (FRL–9358–9), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 2E8025) by Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W., Princeton, NJ 08540. The petition requested that 40 CFR 180.651 be amended by establishing tolerances for residues of the herbicide imazosulfuron, (2-chloro-*N*-[[(4,6-dimethoxy-2-pyrimidinyl)amino]carbonyl] imidazo-[1,2-*a*]pyridine-3-sulfonamide), in or on tuberous and corm vegetables, crop subgroup 1C at 0.02 parts per million (ppm); and in melon, crop subgroup 9A at 0.02 ppm. That document referenced a summary of the petition prepared by Valent USA Corporation, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has modified the commodity definitions to be consistent with Agency policy. The reason for these changes is explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

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

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

A. Toxicological Profile

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

The toxicology data for imazosulfuron suggest that this herbicide possesses relatively low toxicity. Many of the effects of single or repeated dosing were observed near or beyond the respective limit doses.

The primary target organ of imazosulfuron in repeated-dose studies was the liver in all species tested. Mild to moderate thyroid effects were apparent only in the chronic toxicity study in dogs. Dramatic eye effects (retinal degeneration, lens vascularization, cataracts and corneal scarring) were observed in rats fed >1,000 mg/kg/day beginning at 3 months in the chronic toxicity/carcinogenicity study. Ocular effects (increased incidence of eye opacity, corneal edema, inflammation and neovascularization) were also observed in the high-dose males (4,577 mg/kg/day) in the 90-day feeding toxicity study in rats. Decreased body weight and body weight gain compared to control were frequent findings throughout the toxicology database for imazosulfuron.

Clinical signs (decreased motor activity, abnormal gait, upward curvature of the spine and piloerection) were observed in males at the limit dose of the acute neurotoxicity study; however, these effects can be attributed to generalized toxicity and were resolved by day 2 of the study. No neurotoxic effects were observed during the subchronic screening battery or noted as clinical signs in any other repeated-dose study.

No developmental effects were observed at the highest dose tested (HDT) (125 mg/kg/day) in the rabbit developmental toxicity study. No developmental or reproductive toxicity was observed in the 1-generation rat study. Decreased pup viability was observed in the rat 2-generation reproduction study at a dose approaching the limit dose (LOAEL = 892 mg/kg/day) in both the F1 and F2 offspring generations. Mortality was also observed in the parental generation at this dose. No increased qualitative or quantitative offspring susceptibility was apparent in any of the submitted studies for imazosulfuron.

There was no evidence of carcinogenicity in rats and mice up to the limit dose at 24 and 18 months, respectively. Imazosulfuron was determined to be non-mutagenic in bacteria and negative in an *in vivo* mammalian cytogenetics assay. Overall, there was no evidence that imazosulfuron was either mutagenic or clastogenic in either *in vivo* or *in vitro* assays. The cancer classification is ''not likely to be carcinogenic to humans,'' based on the absence of significant tumor increases in the carcinogenicity studies.

Specific information on the studies received and the nature of the adverse effects caused by imazosulfuron as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document titled ''Imazosulfuron: Human Health Risk Assessment for Proposed Uses on Melon (Crop Subgroup 9A) and Tuberous and Corm Vegetables (Crop Subgroup 1C),'' pp. 29–33 in docket ID number EPA–HQ–OPP–2012–0419.

B. Toxicological Points of Departure/Levels of Concern

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

A summary of the toxicological endpoints for imazosulfuron used for human risk assessment is discussed in Unit III.B. of the final rule published in the **Federal Register** of December 29, 2010 (75 FR 81878) (FRL–8857–4).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to imazosulfuron, EPA considered exposure under the petitioned-for tolerances as well as all existing imazosulfuron tolerances in 40 CFR 180.651. EPA assessed dietary exposures from imazosulfuron in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

Such effects were identified for imazosulfuron. In estimating acute dietary exposure, EPA used food consumption information from the U.S. Department of Agriculture (USDA) 2003–2008 National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA). As to residue levels in food, EPA assumed 100 percent crop treated (PCT) and tolerance-level residues for all registered and proposed uses.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 2003–2008 NHANES/WWEIA. As to residue levels in food, EPA assumed 100 PCT and tolerance-level residues for all registered and proposed uses.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that imazosulfuron does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and PCT information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for imazosulfuron. Tolerance level residues and/or 100 PCT were assumed for all food commodities.

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

Based on the Tier 1 Rice Model and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of imazosulfuron for acute exposures are estimated to be 278.9 parts per billion (ppb) for surface water and 4.8 ppb for ground water and for chronic exposures are estimated to be 278.9 ppb for surface water and 4.8 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For the acute dietary risk assessment, the water concentration value of 278.9 ppb was used to assess the contribution to drinking water. For the chronic dietary risk assessment, the water concentration of value 278.9 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Imazosulfuron is currently registered for the following uses that could result in residential exposures: Residential turfgrass and recreational areas. EPA assessed residential exposure using the following assumptions:

Residential handlers may receive short-term dermal and inhalation exposure to imazosulfuron when mixing, loading, and applying the pesticide on home lawns. Since a dermal endpoint of concern was not identified for imazosulfuron, only short-term inhalation exposure of residential handlers was assessed.

Post-application inhalation exposure is not expected due to the nature of pesticide applications to residential lawns. Based on climate effects (such as rain) and post-application activities (such as lawn mowing), inhalation exposure to imazosulfuron is expected to be negligible. Furthermore, imazosulfuron has low acute inhalation toxicity, low vapor pressure (<3.5×10^{-6} Pa) and a low proposed use rate (0.3 lb ai/A). Therefore, EPA assessed only short-term post-application incidental oral exposure of children (toddlers) based on the following scenarios: Incidental oral exposure from treated turf via hand-to-mouth activities; incidental oral exposure from treated turf via object-to-mouth activities; and incidental oral exposure from treated turf via soil ingestion.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/science/residential-exposure-sop.html*.

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

EPA has not found imazosulfuron to share a common mechanism of toxicity with any other substances, and imazosulfuron does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that imazosulfuron does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative*.

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* There is no evidence of increased susceptibility following *in utero* and/or postnatal exposure in the developmental toxicity studies in rats or rabbits, or in the 2-generation rat reproduction study. Neither the rat nor rabbit developmental studies identified developmental effects. The parental NOAEL is clearly defined, less than or equal to the offspring NOAEL and based on general systemic toxicity. At near-limit dose, 20%–30% decreases in numbers of implants/dam, total pups/dam and live pups/dam on post-natal day (PND) 0, and viability index were observed in F_1 pups of the 2-generation reproductive study in rats. Similarly, decreased live pups/dam and live births and viability and lactation indices were noted for F_2 pups at doses that induced parental mortality. The points of departure are protective of these effects.

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

i. The toxicity database for imazosulfuron is complete.

ii. There is no indication that imazosulfuron is a neurotoxic chemical based on clinical observations of neurotoxicity during the conduct of developmental or chronic studies. No adverse neurobehavioral signs were observed at doses approaching the limit dose in any of the short-term studies (subchronic oral, 21-day dermal). No neurotoxic effects were observed during the subchronic neurotoxicity screen in which adverse effects of decreased body weight, body weight gain and food efficiency were observed at 575 mg/kg/day (LOAEL). The acute neurotoxicity screen (ACN) yielded a LOAEL at the limit dose for clinical signs, abnormal gait, decreased activity, piloerection and upward curvature of the spine and decreased motor activity in males, all of which were resolved by day 2. No treatment-related effects were observed in Functional Observational Battery (FOB) parameters, gross and neurohistopathology, motor activity or brain morphometrics of the ACN. The weight of evidence demonstrates that imazosulfuron is not a neurotoxic compound because the clinical findings in the ACN study occurred only at the limit dose and may be attributed to generalized toxicity. A developmental neurotoxicity study is not required at this time.

iii. As discussed in Unit III.D.2., there is no concern for increased susceptibility to offspring following pre- and postnatal exposure to rats or *in utero* exposure in rabbits.

iv. There are no residual uncertainties identified in the exposure databases.

The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to imazosulfuron in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by imazosulfuron.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to imazosulfuron will occupy 1.2% of the aPAD for all infants less than one year old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to imazosulfuron from food and water will utilize 2% of the cPAD for all infants less than one year old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of imazosulfuron is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Imazosulfuron is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to imazosulfuron.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 33,000 for adults and 8,700 for children. Because EPA's level of concern for imazosulfuron is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

An intermediate-term adverse effect was identified; however, imazosulfuron is not registered for any use patterns that would result in intermediate-term residential exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for imazosulfuron.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, imazosulfuron is not expected to pose a cancer risk to humans.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (high performance liquid chromatography method with tandem mass spectroscopy detection (LC/MS/MS)) is available to enforce the tolerance expression.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov*.

B. International Residue Limits

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

The Codex has not established any MRLs for imazosulfuron.

C. Revisions to Petitioned-For Tolerances

The proposed commodity definitions are being modified from ''Melon crop subgroup 9A'' to ''Melon subgroup 9A'' and ''Tuberous and corm vegetables crop subgroup 1C'' to ''Vegetable, tuberous and corm, subgroup 1C'' to be in line with Agency terminology.

V. Conclusion

Therefore, tolerances are established for residues of imazosulfuron, (2-chloro-*N*-[[(4,6-dimethoxy-2-pyrimidinyl)amino]carbonyl] imidazo-[1,2-*a*]pyridine-3-sulfonamide), in or on melon subgroup 9A at 0.02 ppm and vegetable, tuberous and corm, subgroup 1C at 0.02 ppm.

VI. Statutory and Executive Order Reviews

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

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

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

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

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: July 17, 2013.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. In § 180.651, in paragraph (a), add alphabetically the following commodities to the table to read as follows:

§ 180.651 Imazosulfuron; tolerances for residues.

(a) * * *

Commodity	Parts per million
Melon subgroup 9A	0.02
* * * * *	
Vegetable, tuberous and corm, subgroup 1C	0.02

* * * * *

[FR Doc. 2013–17823 Filed 7–23–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2012–0628; FRL–9393–2]

Mancozeb; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of mancozeb in or on walnuts and tangerines. United Phosphorus requested the tolerance for walnuts and Dow AgroSciences requested the tolerance for tangerines under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective July 24, 2013. Objections and requests for hearings must be received on or before September 23, 2013, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2012–0628, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Lois Rossi, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's eCFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–

OPP–2012–0628 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before September 23, 2013. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2012–0628, by one of the following methods:

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

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of May 2, 2012 (77 FR 25954) (FRL–9346–1), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 1F7935) by United Phosphorus, Inc., 630 Freedom Business Center, King of Prussia, PA 19406. The petition requested that 40 CFR 180.176 be amended by establishing tolerances for residues of the fungicide mancozeb in or on walnuts at 0.75 parts per million (ppm). That document referenced a summary of the petition prepared by United Phosphorus, the registrant, which is available in the docket (EPA–HQ–OPP–2012–0044), *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

In the **Federal Register** of September 28, 2012 (77 FR 59578) (FRL–9364–6), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 2E8062) by Dow AgroSciences LLC, 9330 Zionsville Road, Indianapolis, IN 46268. The petition requested that 40 CFR 180.176 be amended by establishing tolerances for residues of the fungicide mancozeb in or on tangerine at 10 ppm. The proposed tolerance supports imports of mandarins, tangerines, and clementines. That document referenced a summary of the petition prepared by Dow AgroSciences, the registrant, which is available in the docket (EPA–HQ–OPP–2012–0628) *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has modified the level at which the tolerance is being established for walnut. The reason for this change is explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

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

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

Mancozeb is a member of the ethylene bisdithiocarbamate (EBDC) group of fungicides that also includes the related active ingredient metiram, the only other registered EBDC. A third EBDC, maneb, is no longer registered for use. Mancozeb and metiram are metabolized to ethylenethiourea (ETU) in the body and both degrade to ETU in the environment. Therefore, EPA has considered the aggregate or combined risks from food, water and non-occupational exposure resulting from mancozeb alone and ETU from all sources (i.e., the other EBDC fungicides) for this action. EPA's assessment of exposures and risks associated with mancozeb and ETU follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. In addition to evaluating mancozeb, EPA also evaluated the risks of ETU, a contaminant, metabolite and degradation product of mancozeb and the other EBDC group of fungicides, which includes the related active ingredient metiram.

1. *Mancozeb.* Mancozeb is not acutely toxic via the oral, dermal or inhalation routes of exposure. Further, mancozeb is not a skin irritant nor is it a skin sensitizer, although it does cause mild eye irritation. The findings in multiple studies demonstrate that the thyroid is a target organ for mancozeb. Thyroid toxicity is manifested as alternations in thyroid hormones, increased thyroid weight, and microscopic thyroid lesions (mainly thyroid follicular cell hyperplasia). These effects are due to the ETU metabolite.

In a subchronic study in the rat, neuropathology was seen microscopically (injury to peripheral nerves) with associated clinical signs (abnormal gait and limited use of rear legs) and loss of muscle mass. Decreased motor activity occurred in the acute neurotoxicity study. In the developmental neurotoxicity study, there was no maternal toxicity and pup effects were limited to decreased body weight. Other toxicity included increases in bilateral retinopathy in the chronic rat study. Elevated cholesterol and a mild, regenerative, anemia occurred in subchronic and chronic dog studies.

Mancozeb is rapidly absorbed and eliminated in the urine. In oral rat metabolism studies with radiolabeled mancozeb and other EBDCs, an average 7.5% *in vivo* metabolic conversion of EBDC to ETU occurred, on a weight-to-weight basis. Metabolism data indicate mancozeb does not bio-accumulate. Mancozeb has been tested in a series of *in vitro* and *in vivo* genotoxicity assays, which have shown that it exhibits weak genotoxic potential.

Thyroid follicular cell adenomas and carcinomas were increased in high-dose males and females in the combined rat toxicity/carcinogenicity study with mancozeb. Doses in a mouse study were too low to assess carcinogenicity, and there were no treatment-related changes in tumor rates. Historically, mancozeb's potential for carcinogenicity has been based on its metabolite ETU, which is classified as a probable human carcinogen. However, since ETU is known to be the chemical causing the thyroid tumors observed, the cancer assessment has been done only for ETU rather than the parent compound.

Developmental defects in the rat developmental toxicity study included hydrocephaly, skeletal system defects, and other gross defects which occurred at a dose causing maternal mortality and did not indicate increased susceptibility of offspring. Abortions occurred in the rabbit developmental toxicity study at the high dose which also caused maternal mortality, and there was no indication of enhanced susceptibility of offspring in the rabbit. There was no evidence of reproductive toxicity in the 2-generation reproduction study in rats. There was evidence of sensitivity in the developmental neurotoxicity study with mancozeb with decreased pup body weight observed in the absence of maternal toxicity; the selected endpoints are protective for these pup effects.

An immunotoxicity study has been reviewed and mancozeb did not show any immunotoxicity potential.

2. *ETU.* The thyroid is a target organ for ETU; thyroid toxicity in subchronic and chronic rat, mouse, and dog studies included decreased levels of thyroxine (T_4), increases or decreases in triiodothyronine (T_3), compensatory increases in levels of thyroid stimulating hormone (TSH), increased thyroid weight, and microscopic thyroid changes, chiefly hyperplasia. Overt liver toxicity was observed in one chronic dog study. ETU is classified as a probable human carcinogen based on liver tumors in female mice.

Developmental defects in the rat developmental study were similar to those seen with mancozeb, and included hydrocephaly and related lesions, skeletal system defects, and other gross defects. These defects showed increased susceptibility to fetuses because they occurred at a dose which only caused decreased maternal food consumption and body weight gain.

An immunotoxicity study on ETU did not show any immunotoxicity potential.

Specific information on the studies received and the nature of the adverse effects caused by mancozeb as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document titled ''*Mancozeb: Human Health Risk Assessment to Support Proposed New Section 3 Uses on Walnuts and Tolerances for Imported Tangerines''* on pages 70–75 in docket ID number EPA–HQ–OPP–2012–0628.

Additionally, specific information on the studies received and the nature of the toxic effects caused by ETU as well as the NOAEL and the LOAEL from the toxicity studies can be found at *www.regulations.gov* in the document titled ''Ethylene Thiourea (ETU); Aggregate Human Health Risk Assessment of the Common Metabolite/Degradate Ethylene Thiourea (ETU) to Support Proposed New Section 3 Use on Walnuts and Tolerance for Imported Tangerines'' on pages 30–33 in docket ID number EPA–HQ–OPP–2012–0628.

B. Toxicological Points of Departure/Levels of Concern

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

A summary of the toxicological endpoints for mancozeb and ETU used for human risk assessment is shown in Tables 1 and 2 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR MANCOZEB FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (Adult Males, Females > 49, and Children ≥ 6 years).	NOAEL = 500 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Acute RfD = 5 mg/kg/day aPAD = 5 mg/kg/day	Acute neurotoxicity study in the rat. LOAEL 1,000 mg/kg/day based on decreased motor activity.
Acute dietary (Children < 6 years).	NOAEL = 500 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF UF_{DB} = 10x	Acute RfD = 5 mg/kg/day aPAD = 0.5 mg/kg/day	Acute neurotoxicity study in the rat. LOAEL 1,000 mg/kg/day based on decreased motor activity.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR MANCOZEB FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute Dietary (Females 13–49 years).	NOAEL = 1.28 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF UF_{DB} = 10x	Acute RfD = 1.3 mg/kg/day aPAD = 0.13 mg/kg/day	Developmental toxicity study in the rat. LOAEL = 512 mg/kg/day based on hydrocephaly and other malformations.
Chronic dietary (Adult Males, Females > 49, and Children ≥ 6 years).	NOAEL = 4.83 mg/kg/day. UF_A = 3x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.16 mg/kg/day cPAD = 0.16 mg/kg/day	Toxicity/Carcinogenicity in the rat. LOAEL = 30.9 mg/kg/day based on thyroid toxicity.
Chronic dietary (Females 13–49 years and Children < 6 years).	NOAEL = 4.83 mg/kg/day. UF_A = 3x UF_H = 10x FQPA SF UF_{DB} = 10x	Chronic RfD = 0.16 mg/kg/day cPAD = 0.016 mg/kg/day	Toxicity/Carcinogenicity in the rat. LOAEL = 30.9 mg/kg/day based on thyroid toxicity.
Inhalation all durations (Adult Males, Females > 49 years, and Children ≥ 6 years).	Inhalation study NOAEL = 0.079 mg/L (21 mg/kg/day). UF_A = 3x UF_H = 10x FQPA SF = 1x	LOC for MOE = 30	Subchronic Inhalation in the rat. LOAEL = 0.326 mg/L based on thyroid toxicity.
Inhalation all durations (Females 13–49 years and Children < 6 years).	Inhalation study NOAEL= 0.079 mg/L (21 mg/kg/day). UF_A = 3x UF_H = 10x FQPA SF UF_{DB} = 10x	LOC for MOE = 300	Subchronic Inhalation in the rat. LOAEL = 0.326 mg/L based on thyroid toxicity.
Cancer (Oral, dermal, inhalation).	Mancozeb's potential for carcinogenicity is due to the formation of the metabolite, ETU, which is classified as a probable human carcinogen. Mancozeb's cancer risk is calculated by estimating exposure to mancozeb-derived ETU and using the ETU cancer potency factor (Q_1^*) of 6.01×10^{-2} $(mg/kg/day)^{-1}$ to quantitate risk.		

FQPA SF = Food Quality Protection Act Safety Factor. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligrams/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_{DB} = to account for the absence of data or other data deficiency. UF_H = potential variation in sensitivity among members of the human population (intraspecies).

TABLE 2—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ETU FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (General population including infants and children).	A study with acute toxicity applicable to the general population was not identified.		
Acute Dietary (Females 13–49 years).	NOAEL = 5 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF UF_{DB} = 10x	Acute RfD = 0.05 mg/kg/day. aPAD = 0.005 mg/kg/day	Developmental Rat Toxicity. LOAEL = 10 mg/kg/day, based on hydrocephaly and other malformations.

TABLE 2—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ETU FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Chronic dietary (Adult Males, Females > 49, and Children ≥ 6 years).	NOAEL = 0.18 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.0018 mg/kg/day. cPAD = 0.0018 mg/kg/day	Dog Chronic Oral Toxicity. LOAEL = 1.99 mg/kg/day based on thyroid toxicity.
Chronic dietary (Females 13–49 years and Children < 6 years).	NOAEL = 0.18 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF UF_{DB} = 10x	Chronic RfD = 0.0018 mg/kg/day. cPAD = 0.00018 mg/kg/day	Dog Chronic Oral Toxicity. LOAEL = 1.99 mg/kg/day based on thyroid toxicity.
Dermal short and intermediate-term (Children < 6 years old).	Oral study .... NOAEL = 7 mg/kg/day (dermal absorption rate = 26%) UF_A = 10x UF_H = 10x FQPA SF = 10x	LOC for MOE = 1,000.	4-Week Range-Finding Dog Study. LOAEL = 34 mg/kg/day based on thyroid toxicity.
Dermal short and intermediate-term (Adult Males, Females. > 49 years, Children ≥ 6 years).	Oral study .... NOAEL = 7 mg/kg/day (dermal absorption rate = 26%) UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	4-Week Range-Finding Dog Study. LOAEL = 34 mg/kg/day based on thyroid toxicity.
Dermal short- and intermediate-term (Females 13–49 years old).	Oral study .... NOAEL = 5 mg/kg/day (dermal absorption rate = 26%) UF_A = 10x UF_H = 10x FQPA SF = 10x	LOC for MOE = 1,000.	Developmental Rat Toxicity. LOAEL = 10 mg/kg/day, based on hydrocephaly and other malformations.
Inhalation short- and intermediate-Term (Children < 6 years of age).	Oral study .... NOAEL = 7 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF UF_{DB} = 10x	LOC for MOE = 1,000.	4-Week Range-Finding Dog Study. LOAEL = 34 mg/kg/day based thyroid toxicity.
Inhalation short- and intermediate-term (adult males, females > 49 years, children ≥ 6 years).	Oral study .... NOAEL= 7 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	4-Week Range-Finding Dog Study. LOAEL = 34 mg/kg/day based thyroid toxicity.
Inhalation short- and intermediate-term (Females 13–49 years old).	Oral study .... NOAEL = 5 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 10x	LOC for MOE = 1,000.	Developmental Rat Toxicity. LOAEL = 10 mg/kg/day, based on hydrocephaly and other malformations.
Cancer (Oral, dermal, inhalation).	ETU is classified as a probable human carcinogen. ETU's cancer potency factor (Q_1^*) is 6.01×10^{-2} (mg/kg/day)$^{-1}$.		

FQPA SF = Food Quality Protection Act Safety Factor. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligrams/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_{DB} = to account for the absence of data or other data deficiency. UF_H = potential variation in sensitivity among members of the human population (intraspecies).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to mancozeb, EPA considered exposure under the petitioned-for tolerances as well as all existing mancozeb tolerances in 40 CFR 180.176. In evaluating dietary exposure to ETU, EPA considered exposure under the petitioned-for tolerances discussed in this document as well as all existing uses of the EBDC group of fungicides

(mancozeb and metiram). EPA assessed dietary exposures from mancozeb and ETU in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. Such effects were identified for mancozeb and ETU. In estimating acute dietary exposure for both mancozeb and ETU, EPA used food consumption information from the 2003–2008 food consumption data from the U.S. Department of Agriculture's (USDA's) National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA).

a. *Mancozeb.* The Agency conducted a highly refined, probabilistic acute dietary assessment incorporating field trial or monitoring data from the EBDC/ETU Market Basket Survey, percent crop treated (PCT) information, and processing study results to assess the established uses of mancozeb. The monitoring data were used for several commodities (corn, cucumber, onion, pumpkin, potato, squash, starfruit, tomato, meat, and milk). For evaluation of the proposed new uses and tolerances, field trial data, processing factors, PCT data based on section 18 usage for walnuts, and percent imported commodity in domestic consumption data on tangerines for mancozeb were used to refine residue estimates. The entire distributions of residue data from field trials or monitoring data were used to generate residue distribution files (RDFs) for commodities that are considered to be not blended or partially blended. For commodities considered to be blended, the average residues incorporating the likely maximum estimated PCT was used as a point estimate.

b. *ETU.* The Agency conducted a highly refined, probabilistic acute dietary assessment incorporating field trial or monitoring data from the EBDC/ETU Market Basket Survey, PCT information, and processing study results to assess exposures to ETU from the established uses of mancozeb and metiram. The monitoring data were used for several commodities (corn, cucumber, onion, pumpkin, potato, squash, starfruit, tomato, meat, and milk). For evaluation of the proposed new uses and tolerances, field trial data, processing factors, PCT data based on section 18 usage for walnuts, and percent imported commodity in domestic consumption data on tangerines for mancozeb were used to refine residue estimates. The entire distributions of residue data from field trials or monitoring data were used to generate residue distribution files (RDFs) for commodities that are considered to be not blended or partially blended. For commodities considered to be blended, the average residues incorporating the likely maximum estimated PCT was used as a point estimate.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment for both mancozeb and ETU, EPA used food consumption information from the 2003–2008 food consumption data from the USDA NHANES/WWEIA.

a. *Mancozeb.* The chronic dietary exposure and risk assessment for mancozeb (non-cancer and cancer) incorporated average values based either on field trial data or monitoring data and average PCT data for new and existing uses, as well as processing and cooking factors. Averages of the field trials were used for the walnuts and tangerines, while field trial and market basket survey data were used for established uses.

b. *ETU.* Chronic anticipated residues were calculated using average values based either on field trial data or monitoring data and average PCT data or average projected PCT as well as processing and cooking factors. Averages of the field trials were used for the walnuts and tangerines, while field trial and market basket survey data were used for established uses.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. If quantitative cancer risk assessment is appropriate, cancer risk may be quantified using a linear or nonlinear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or nonlinear approach is used and a cancer RfD is calculated based on an earlier noncancer key event. If carcinogenic mode of action data are not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized.

The cancer risks were aggregated using the food and drinking water doses for the general population and the food, water and recreational doses for home gardeners (considered protective of other residential scenarios). The average daily dose was used for food and water exposures and the lifetime average daily dose was used for the recreational exposures. The aggregate doses were multiplied times the potency factor for ETU, 0.0601 (mg/kg/day) $^{-1}$ to determine the cancer risks.

Mancozeb degrades and/or metabolizes to ETU which causes thyroid tumors; therefore, EPA has historically attributed mancozeb's carcinogenicity to the formation of ETU, which is classified as a probable human carcinogen. The Agency has used the cancer potency factor (Q_1*) of 0.0601 (mg/kg/day) $^{-1}$ for ETU (based on liver tumors in female mice) for risk assessment. Therefore, cancer risk from exposure to mancozeb has been calculated by estimating exposure to mancozeb-derived ETU and using the Q_1* for ETU. The same approach has been taken for the other EBDCs. EPA's estimated exposure to mancozeb-derived ETU included ETU residues found in food as well as ETU formed by metabolic conversion on parent mancozeb in the body (conversion rate of 0.075).

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such Data Call-Ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

• Condition a: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.

• Condition b: The exposure estimate does not underestimate exposure for any significant subpopulation group.

• Condition c: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

For mancozeb and ETU derived from mancozeb, the following maximum PCT estimates were used in the acute dietary risk assessment for the following crops: Apples: 45%; asparagus: 30%; barley: 2.5%; cantaloupes: 15%; carrots: 2.5%; celery: 2.5%; corn: 2.5%; cranberries: 20%; cucumbers: 50%; grapes: 20%; oats: 1%; onions: 70%; peanuts: 2.5%; pears: 50%; potatoes: 65%; pumpkins: 15%; rice: 2.5%; spinach: 2.5%; squash: 30%; sugar beets: 2.5%; sweet corn: 15%; tomatoes: 50%; watermelons: 50%; and wheat: 2.5%. A percent import value of 99% was used for banana.

For mancozeb and ETU derived from mancozeb, the following average PCT estimates were used in the chronic and cancer dietary risk assessments for the following crops: Apples: 40%; asparagus: 15%; barley: 1%; cantaloupes: 5%; carrots: 1%; celery: 1%; cherries: 1%; corn: 1%; cranberries: 20%; cucumbers: 25%; grapes: 10%; oats: 1%; onions: 60%; peanuts: 2.5%; pears: 40%; potatoes: 55%; pumpkins: 10%; rice: 1%; spinach: 1%; squash: 20%; sugar beets: 1%; sweet corn: 5%; tomatoes: 25%; watermelons: 40%; and wheat: 1%. A percent import value of 99% was used for banana.

As a further refinement, the commodity having the highest PCT results with livestock feed uses had these values applied to meat and milk (potato; 65% CT maximum for acute and 55% CT average for chronic).

For ETU derived from metiram, the following maximum PCT estimates were used in the acute dietary risk assessment: apples: 15%; potatoes: 10%. A 31% imported commodity in domestic consumption was used for wine grapes.

For ETU derived from metiram, the following average PCT estimates were used in the chronic and cancer dietary risk assessment: Apples: 10%; potatoes: 5%. A 31% imported commodity in domestic consumption was used for wine grapes.

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6–7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

Also, for the acute risk assessment for mancozeb and ETU derived from mancozeb, the Agency estimated PCT for the following uses for mancozeb, which were recently approved in 2011: Almond, 25%; broccoli, 6%; cabbage, 47%; cabbage, Chinese, 47%; head lettuce 75%; leaf lettuce 66%; pepper, bell, 48%; pepper, non-bell, 48%. For the chronic risk assessment for mancozeb and ETU derived from mancozeb, the Agency estimated PCT as follows: Almond, 18%; broccoli, 5%; cabbage, 42%; cabbage, Chinese, 42%; head lettuce 67%; leaf lettuce 62%; pepper, bell, 44%; pepper, non-bell, 44%. Since metiram is not registered for use on these crops, all potential ETU exposure on these crops will result from use of mancozeb.

EPA developed these refined PCT values based on a detailed chemical-specific analysis. EPA has considered all available relevant information and concludes that it is unlikely that the PCT values for these uses will be exceeded during the next 5 years. Further discussion of how these PCT values were derived can be found at *www.regulations.gov* in the document titled ''Percent Crop Treated for new Uses (PCTn) of Mancozeb on Almonds, Broccoli, Cabbage, Pepper, Pumpkin, and Winder Squash, PC Code: 014504; DP Barcode: 360397; Lettuce, both head and Other; PC Code: 014504; DP Barcode: 364745, NON PRIA, Parent DP: 635267; and Percent Crop Treated with Maneb for Collards, Mustard Greens, Turnip Greens, and Kale'' in docket ID number EPA–HQ–OPP–2012–0628.

For mancozeb and ETU derived from mancozeb, a maximum PCT projected estimate of 50% for walnuts and a maximum percent import consumption value of 35% for tangerines were used in the acute dietary risk assessment. An average PCT estimate of 40% for walnuts as well as an average percent imported commodity in domestic consumption value of 29% for tangerines were used in the chronic and cancer dietary risk assessments.

The walnut information is an amalgamation of the USDA/NASS and private pesticide market research data. The PCT values for walnuts are derived from survey data reported in 2006, 2010, and 2011. Only the state of California is represented in the survey data as 99% of the walnuts grown in the United States are grown in that state. The percent of imported fresh mandarin oranges in domestic consumption was calculated with data for the reporting period of 2008–2013 obtained from the Foreign Agricultural Service (FAS) USDA/Office of Global Analysis (FAS, 2013).

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which mancozeb may be applied in a particular area.

2. *Dietary exposure from drinking water—i. Mancozeb.* The Agency has determined that mancozeb is very short-lived in soil and water, and would not reach water used for human consumption whether from surface water or ground water.

ii. *ETU.* ETU is highly water soluble, and may reach both surface water and ground water under some conditions. The ETU surface water Estimated Drinking Water Concentrations (EDWCs) were generated using a combined monitoring/modeling approach. Results of a surface water monitoring study conducted by the ETU Task Force were used to refine the outputs of the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM–EXAMS) models; the site/scenario modeled was application of an EBDC fungicide on peppers in Florida, and was chosen to produce the highest EDWC acute values. The ground water EDWC was detected in a Florida community water system intake in a targeted ground water monitoring study conducted by the EBDC task force from 1999 to 2003. Both these surface water and ground water values represent upper-bound conservative estimates of the total ETU residual concentrations that might be found in surface water and ground water due to the use of the EBDC fungicides.

Based on the PRZM/EXAMS and monitoring studies, the EDWCs of ETU acute and chronic exposures are estimated to be 25.2 parts per billion (ppb), and 0.1 ppb, respectively for surface water. The EDWC for acute and chronic exposure is estimated to be 0.21 ppb for ground water.

Estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 25.2 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment of ETU, the water concentration of value 0.21 ppb was used to assess the contribution to drinking water. For cancer dietary risk assessment of ETU, the water concentration of value 0.21 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

1. *Mancozeb.* Mancozeb is currently registered for use on the following residential sites: Home gardens, golf courses, and sod farms (where treated sod could be transplanted to a residential setting). The Agency has determined that it is appropriate to aggregate chronic exposure through food with short-term residential exposures to mancozeb.

The exposure scenario that was evaluated for mancozeb was the residential handler home garden use which considers residential handler exposures (inhalation) to adult applicators combined with average food exposures. Dermal exposure was not evaluated because no effects were observed in a mancozeb 28-day dermal toxicity study.

For post-application, dermal exposure to home gardeners (adults and youth) harvesting vegetables from treated gardens and golfers (adults and youth) contacting mancozeb-treated turf after application is possible. However, as no dermal hazard was identified for mancozeb, a quantitative dermal post-application assessment (non-cancer/short-term and cancer) for the dermal exposure to home gardeners and golfers (adults and youth) was only performed for its metabolite, ETU.

The previous mancozeb risk assessment had evaluated the short/intermediate-term exposure of toddlers to treated turf from the sod farm use. In the most recent risk assessment, the Agency considered post-application exposure resulting from this scenario to be negligible for the following reasons: (1) Mancozeb has a post-harvest interval (PHI) of 5 days for sod; (2) it is unlikely that sod treated with mancozeb would be installed more than once per year; (3) transplanted sod requires constant and significant watering which will result in decreased mancozeb residues on the transplanted sod; and (4) it is unlikely that adults or children will spend any significant amount of time on recently transplanted sod until it is rooted which typically occurs around 2 weeks after transplanting. Therefore, dermal and incidental oral post-application scenarios were not quantitatively assessed for the sod farm use of mancozeb. There are no post-application exposure risks of concern anticipated from the use of mancozeb on sod farms.

ii. *ETU.* ETU non-dietary exposure is expected as a result of the registered uses of mancozeb, which is currently registered for use on the following residential sites: home gardens, golf courses, and sod farms (where treated sod could be transplanted to a residential setting). There are no uses of metiram that will result in exposure in residential settings. The Agency has determined that it is appropriate to aggregate chronic exposure through food with short-term residential exposures to ETU.

The scenario that was evaluated for ETU was the residential home garden use, which considered handler garden exposures (inhalation and dermal) plus average daily food and drinking water exposure for adults and post-application garden exposures (dermal) plus average daily food and drinking water exposure for females 13–49 years old and youths.

The previous risk assessment also considered treated turf (sod farm) post-application exposures to toddlers (incidental oral and dermal). This more recent risk assessment did not evaluate the sod farm use for the reasons outlined above in the mancozeb non-dietary exposure section.

The previous risk assessment also calculated risks for adult and youth golfers from golfing on treated turf. The more recent assessment concluded that for residential post-application, the gardening scenarios represent the most conservative exposure estimates and are used in the aggregate assessment. The gardening scenarios result in higher estimated exposure than the golfing scenarios and are therefore protective of any golfer risk.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

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

As previously mentioned, the risk estimates summarized in this document are those that result only from the use of mancozeb, and ETU derived from mancozeb and metiram, the other registered EBDC chemical, both of which are dithiocarbamates. For the purposes of this action, EPA has concluded that mancozeb does not share a common mechanism of toxicity with other substances. The Agency reached this conclusion after a thorough internal review and external peer review of the data on a potential common mechanism of toxicity.

EPA concluded that the available evidence does not support grouping the dithiocarbamates based on a common toxic effect (neuropathology) occurring by a common mechanism of toxicity (related to metabolism to carbon disulfide). After a thorough internal and external peer review of the existing data bearing on a common mechanism of toxicity, EPA concluded that the available evidence shows that neuropathology cannot be linked with carbon disulfide formation. For more information, please see the December 19, 2001 memo, ''The Determination of Whether Dithiocarbamate Pesticides Share a Common Mechanism of Toxicity'' on the internet at *http://www.epa.gov/oppsrrd1/cumulative/dithiocarb.pdf.*

D. Safety Factor for Infants and Children

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

this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*—i. *Mancozeb.* In the rat developmental study, developmental effects were observed in the presence of severe maternal effects, including maternal mortality and clinical signs. In the rabbit developmental study, developmental effects (spontaneous abortions) were observed at the same dose (80 mg/kg/day) at which maternal effects included mortality and clinical signs. In the rat reproduction study, no effects were observed in offspring, while thyroid effects and body weight gain decrements occurred in adults. There was evidence of sensitivity in the developmental neurotoxicity study with mancozeb with decreased pup body weight occurring in the absence of maternal toxicity; risk assessment endpoints are protective for these pup effects.

ii. *ETU.* There is evidence of increased susceptibility of fetuses to ETU. Fetal malformations occurred mainly in rats, although hydrocephaly and domed head were observed in a rabbit developmental study with ETU. The malformations in rats occurred throughout the body. Hydrocephaly occurred in the absence of maternal toxicity after treatment with a single dose of ETU. There was a steep dose-response for the malformations in rats. An acceptable reproductive toxicity study was not available for ETU. As a result, the Agency evaluated the level of concern for the effects observed when considered in the context of all available toxicity data. In addition, the Agency evaluated the database to determine if there were residual uncertainties after establishing toxicity endpoints and traditional uncertainty factors to be used in the ETU risk assessment.

3. *Conclusion for mancozeb.* EPA is retaining the 10X FQPA safety factor for women of childbearing age and for children less than 6 years old but has determined that reliable data show the safety of children greater than 6 years of age would be adequately protected if the FQPA safety factor were reduced to 1X. That decision is based on the following findings:

i. The toxicology database for mancozeb is complete, except that it lacks adequate data on the developing thyroid. Brain development is very sensitive to perturbations in thyroid hormones and it is possible that the developmental thyroid study (being conducted with ETU) could result in lower NOAELs for women of childbearing age (i.e., fetuses) and for children less than 6 years old. Results from the developmental thyroid study will not affect endpoints for children over 6 years of age (for whom the thyroid system is more developed) or adults as thyroid data for those populations are already available. Therefore, the FQPA safety factor is reduced to 1X for these populations.

ii. There was some evidence of neurotoxicity for mancozeb as seen in the acute and subchronic neurotoxicity studies; however, no neurotoxicity occurred in the DNT. Additionally, there are clear NOAELs identified for the effects observed in the toxicity studies. The doses and endpoints selected for risk assessment are protective of all neurotoxicological effects observed in the database.

iii. As noted above in Unit III.D.2., there was some evidence of increased susceptibility of rat pups to mancozeb exposure. Aside from the uncertainty resulting from the lack of adequate thyroid data (for which EPA is retaining the 10X FQPA safety factor), there are clear NOAELs for the offspring effects, and regulatory doses were selected to be protective of these effects.

iv. There are no residual uncertainties identified in the exposure databases. The acute, chronic, and cancer dietary exposure assessments were refined and used PCT estimates and monitoring residue values for several commodities, including some major contributors to the dietary risk such as milk and corn commodities. Monitoring or modeling data were used to derive estimated drinking water concentrations. The drinking water concentrations that were derived from monitoring data reflect the highest value found in a community well monitoring program. The drinking water concentrations from modeling used conservative, health-protective, high-end estimates and are unlikely to be exceeded. The residential exposure assessment used residential SOPs, which are based on conservative high-end assumptions such as maximum application rates and day 0 exposures. Given the overall conservative nature of the exposure assumptions, the aggregate (food, water, and residential) exposure and risk estimates presented in this assessment are not expected to underestimate actual exposure and risk expected based on the current and proposed use patterns.

4. *Conclusion for ETU.* EPA is retaining the 10X FQPA safety factor for women of childbearing age and for children less than 6 years old but has determined that reliable data show the safety of children 6 years of age or older would be adequately protected if the FQPA safety factor were reduced to 1X. That decision is based on the following findings:

i. The toxicology database for ETU is missing a developmental thyroid study, a reproduction study, and a developmental neurotoxicity (DNT) study. These data gaps are being addressed by an ongoing extended one-generation reproductive toxicity study. Because the developing brain is very sensitive to perturbations in thyroid hormones, it is possible that these studies could result in lower NOAELs for women of childbearing age (i.e., fetuses) and for children less than 6 years old; however, results from the developmental thyroid study will not affect points of departure for children greater than 6 years of age, who have a thyroid system similar to adults, adult females greater than 49 years of age (assumed to be beyond typical child-bearing age), or adult males since thyroid data for those populations are already available. Additionally, endpoints from the other segments of the extended one-generation study will not affect these latter populations, and the FQPA safety factor is being reduced to 1X for these populations.

ii. Although the ETU studies were inadequate in evaluating signs of neurotoxicity, there was no evidence of neurotoxicity seen in any study in the database. In any event, the Agency has determined that the selected endpoints would be protective of potential neurotoxicity. The basis for this is that the principal toxic effects occur in the thyroid; thyroid effects provide the most sensitive endpoint, which the Agency is regulating on. Although the extended 1-gen study being performed on ETU is evaluating the potential for effects on the developing brain, the Agency does not believe that a 10X FQPA safety factor is necessary to protect children 6 years old or older because: (1) The weight-of-evidence of the available data indicates that thyroid effects are the most sensitive effect of this chemical; (2) the Agency is regulating on the more sensitive thyroid effect; and (3) the Agency is retaining a 10X FQPA safety factor for the population most likely affected by the thyroid effects.

iii. As noted in Unit III.D.2., there is evidence of increased quantitative and qualitative susceptibility following increased *in utero* exposure to ETU. The developmental study with the lowest NOAEL was selected for the acute endpoint for women of childbearing age and is therefore protective of the developmental malformations. The only remaining developmental uncertainties are related to effects on the developing fetus caused by perturbations in the still-not-completely-developed thyroid in children younger than 6 years old. Brain development being very sensitive to perturbations in thyroid hormones, it is possible that the extended 1-generation reproductive toxicity test, in which developmental thyroid effects will be evaluated, will result in lower NOAELs for these populations than are presently being used to assess risk; therefore, the Agency is retaining the 10X FQPA safety factor for females 13–49 years of age and for children less than 6 years of age.

iv. There are no residual uncertainties identified in the EBDC's (mancozeb or metiram) exposure databases for ETU assessment. The acute, chronic, and cancer dietary exposure assessments were refined and used PCT estimates and monitoring residue values for several commodities including some major contributors to the dietary risk such as milk and corn commodities. Monitoring or modeling data were used to derive estimated drinking water concentrations. The drinking water concentrations that were derived from monitoring data reflect the highest value found in a community well monitoring program. The drinking water concentrations from modeling used conservative, health-protective, high-end estimates and are unlikely to be exceeded. The residential exposure assessment used residential SOPs, which are based on conservative high-end assumptions such as maximum application rates and day 0 exposures. Given the overall conservative nature of the exposure assumptions, the aggregate (food, water, and residential) exposure and risk estimates presented in this assessment are not expected to underestimate actual exposure and risk expected based on the current and proposed use patterns.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk. (mancozeb).* The mancozeb acute aggregate assessment considers acute exposure to mancozeb only and not ETU. Further, this assessment is based on residues of mancozeb in food only since residues of mancozeb are not expected in drinking water. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food to mancozeb will occupy 9.9% of the aPAD for children 1–2 years old, the population subgroup receiving the greatest exposure.

2. *Acute risk (ETU).* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to ETU (from mancozeb and metiram) will occupy 60% of the aPAD for females 13–49 years of age, the only population group of concern.

3. *Chronic risk (mancozeb).* There are no long-term residential exposure scenarios for mancozeb and there is not likely to be residues of mancozeb in drinking water. Therefore, the long-term or chronic (non-cancer) aggregate risk for mancozeb includes contribution from food alone. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to mancozeb from food will utilize 2.3% of the cPAD for children 1–2 years of age, the population group receiving the greatest exposure.

4. *Chronic risk (ETU).* There are no long-term residential exposure scenarios for ETU; the aggregate chronic risks were calculated using food and water exposure only. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to ETU (from mancozeb and metiram) from food and water will utilize 58% of the cPAD for children (1 to 2 years old), the population group receiving the greatest exposure.

5. *Short-term risk (mancozeb).* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Mancozeb is currently registered for uses that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food with short-term residential exposures to mancozeb. The scenario that was evaluated for mancozeb was the residential handler home garden use. The aggregate short-term home garden MOEs for adult males and females greater than 49 years old is 99,000 and the MOE for adult females 13–49 years old is 94,000. Because for mancozeb EPA is concerned only with MOEs that are below 30 (adult males and females greater than 49 years old) and 300 (adult females 13–49 years old), these MOEs do not raise a risk concern.

6. *Short-term risk (ETU).* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Mancozeb is currently registered for uses that could result in short-term residential exposure to ETU. There are no residential uses for metiram. The Agency determined that it was appropriate to aggregate chronic exposure through food with short-term residential exposures to ETU. The ETU short-term handler home garden aggregate MOE for adult females 13–49 years old is 27,000 and for adult males (and females older than 49 years old) is 42,000. The ETU short-term post-application home garden aggregate MOE for adult females 13–49 years old is 2,600 and for youths 11–16 years old is 3,100. Because for ETU EPA is concerned only with MOEs that are below 1,000 (adult females 13–49 years old) and 100 (adult males, females >49 years old and youth 11–16 years old), these MOEs do not raise a risk concern.

7. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

An intermediate-term adverse effect was identified; however, mancozeb is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for mancozeb.

8. *Aggregate cancer risk for U.S. population.* As noted earlier in this document, mancozeb degrades and/or metabolizes to ETU which causes the same types of thyroid tumors as those seen when animals are dosed with mancozeb; therefore, EPA has historically attributed mancozeb's carcinogenicity to the formation of ETU, which is classified as a probable human carcinogen.

The cancer aggregate risk estimates (home garden handler and post-application scenarios) for the U.S.

population are 2×10^{-6} and 3×10^{-6}, respectively.

EPA generally considers cancer risks (expressed as the probability of an increased cancer case) in the range of 1 in 1 million (or 1×10^{-6}) or less to be negligible. The precision which can be assumed for cancer risk estimates is best described by rounding to the nearest integral order of magnitude on the logarithmic scale; for example, risks falling between 3×10^{-7} and 3×10^{-6} are expressed as risks in the range of 10^{-6}. Considering the precision with which cancer hazard can be estimated, the conservativeness of low-dose linear extrapolation, and the rounding procedure described above, cancer risk should generally not be assumed to exceed the benchmark level of concern of the range of 10^{-6} until the calculated risk exceeds approximately 3×10^{-6}. This is particularly the case where some conservatism is maintained in the exposure assessment. Although the mancozeb risk assessment is highly refined, the Agency believes there is some conservatism for the following reasons: (1) The linear low-dose extrapolation approach is conservative because it does not take into account certain human biological processes such as reversibility and repair; (2) the residential SOPs are based on conservative high-end assumptions such as maximum application rates and day 0 exposures; and (3) some food exposures are estimated based on tolerance-level residues. Accordingly, EPA has concluded the cancer risk for all existing mancozeb uses and the uses associated with the tolerances established in this action fall within the range of 1×10^{-6} and are thus negligible.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate methods are available for the enforcement of tolerances for the plant commodities which are the subject of this request. The Pesticide Analytical Method (PAM) Vol. II lists Methods I, II, III, IV, and A for the determination of dithiocarbamate residues in/on plant commodities. The Keppel colorimetric method (Method III) is the preferred method for tolerance enforcement. The Keppel method determines EBDCs as a group by degradation to CS_2. The analytical methodology for ETU is based on the original method published by Olney and Yip (JAOAC 54:165–169).

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

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

There is no Codex MRL established for mancozeb on walnuts.

There is a MRL of 10 ppm established by Codex for the use of EBDC compounds on mandarins which is consistent with the 10 ppm tolerance on tangerine being established by this document.

C. Revisions to Petitioned-For Tolerances

Based on the evaluation of the residue data, the Agency is modified the tolerance for walnuts from the proposed level of 0.75 ppm to 0.70 ppm. EPA revised the tolerance levels based on analysis of the residue field trial data using the Organization for Economic Cooperation and Development (OECD) tolerance calculation procedures.

V. Conclusion

Therefore, tolerances are established for residues of mancozeb, in or on walnut at 0.70 ppm and tangerine at 10 ppm.

VI. Statutory and Executive Order Reviews

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

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

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

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology

Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: July 16, 2013.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. In § 180.176, add alphabetically the following commodities and the footnote to the table in paragraph (a) to read as follows:

§ 180.176 Mancozeb; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * * *	*
Tangerine[1]	10
* * * *	*
Walnut	0.70
* * * *	*

[1] There are no U.S. registrations for use of mancozeb on tangerine.

* * * * *

[FR Doc. 2013–17869 Filed 7–23–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1990–0010; FRL 9836–9]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Deletion of the Sola Optical U.S.A., Inc. Superfund Site

AGENCY: Environmental Protection Agency.

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) Region 9 is publishing a direct final Notice of Deletion of the Sola Optical U.S.A., Inc. Superfund Site (Site), located in Petaluma, California, from the National Priorities List (NPL). 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). This direct final deletion is being published by EPA with the concurrence of the State of California, through the California Regional Water Quality Control Board—San Francisco Bay Region, because EPA has determined that all appropriate response actions under CERCLA have been completed. However, this deletion does not preclude future actions under Superfund.

DATES: This direct final deletion is effective September 23, 2013, unless EPA receives adverse comments by August 23, 2013. If adverse comments are received, EPA will publish a timely withdrawal of the direct final deletion in the **Federal Register** informing the public that the deletion will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–1990–0010, by one of the following methods:

- *http://www.regulations.gov*. Follow on-line instructions for submitting comments.
- *Email: rodriguez.dante@epa.gov*.
- *Fax:* (415)947–3528.
- *Mail:* Dante Rodriguez, U.S. EPA Region 9, mail code SFD–8–2, 75 Hawthorne Street, San Francisco, CA 94105.
- *Hand delivery:* U.S. EPA Region 9, 75 Hawthorne Street, mail code SFD–8–2, San Francisco, CA 94105.

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–1900–0010. 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 statue. 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:

Superfund Records Center, 95 Hawthorne St., Room 403, Mail Stop SFD–7C, San Francisco, CA 94105, (415) 536–2000, Mon–Fri: 8:00 a.m. to 5:00 p.m.;

or the Site Repository at

Petaluma Public Library, 100 Fairgrounds Drive, Petaluma, CA 94952, (707) 763–9801, Mon, Thurs, Fri, Sat: 10:00 a.m. to 6:00 p.m., Tues, Wed: 10:00 a.m. to 9:00 p.m.

FOR FURTHER INFORMATION CONTACT: Dante Rodriguez, Remedial Project Manager, U.S. Environmental Protection Agency, Region 9, SFD–8–2, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3166, email: *rodriguez.dante@epa.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents:

I. Introduction

EPA Region 9 is publishing this direct final Notice of Deletion of the Sola Optical U.S.A., Inc. Superfund site (Site), from the National Priorities List (NPL). 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 the list of 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). As described in 300.425(e)(3) of the NCP, sites deleted from the NPL remain eligible for Fund-financed remedial actions if future conditions warrant such actions.

Because EPA considers this action to be noncontroversial and routine, this action will be effective September 23, 2013 unless EPA receives adverse comments by August 23, 2013. Along with this direct final Notice of Deletion, EPA is co-publishing a Notice of Intent to Delete in the ''Proposed Rules'' section of the **Federal Register**. If adverse comments are received within the 30-day public comment period on this deletion action, EPA will publish a timely withdrawal of this direct final Notice of Deletion before the effective date of the deletion, and the deletion will not take effect. EPA will, as appropriate, prepare a response to comments and continue with the deletion process on the basis of the Notice of Intent to Delete and the comments already received. There will be no additional opportunity to comment.

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 Sola Optical U.S.A., Inc. Superfund Site and demonstrates how it meets the deletion criteria. Section V discusses EPA's action to delete the Site from the NPL unless adverse comments are received during the public comment period.

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 the Site:

(1) EPA consulted with the State of California prior to developing this direct final Notice of Deletion and the Notice of Intent to Delete co-published today in the ''Proposed Rules'' section of the **Federal Register**.

(2) EPA has provided the state 30 working days for review of this notice and the parallel Notice of Intent to Delete prior to their publication today, and the state, through the California Regional Water Quality Control Board—San Francisco Bay Region, has concurred on the deletion of the Site from the NPL.

(3) Concurrently with the publication of this direct final Notice of Deletion, a notice of the availability of the parallel Notice of Intent to Delete is being published in a major local newspaper, the Petaluma Argus-Courier. The newspaper notice announces the 30-day public comment period concerning the Notice of Intent to Delete the Site from the NPL.

(4) The EPA placed copies of documents supporting the proposed deletion in the deletion docket and made these items available for public inspection and copying at the Site information repositories identified above.

(5) If adverse comments are received within the 30-day public comment period on this deletion action, EPA will publish a timely notice of withdrawal of this direct final Notice of Deletion before its effective date and will prepare a response to comments and continue with the deletion process on the basis of the Notice of Intent to Delete and the comments already received.

Deletion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Deletion 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 Site Deletion

The following information provides EPA's rationale for deleting the Site from the NPL:

Site Background and History

The Site (CAD981171523) is located at 1500 Cader Lane in the City of Petaluma in Sonoma County, California. The Site's main property contains a manufacturing building and adjoining administration office building. Six underground storage tanks (USTs) were formerly located behind the north corner of the manufacturing facility. The Site building is currently occupied by three companies, which utilize the main facility building. There is a fence located along the eastern Site boundary. Since 2005, an asphalt parking lot and four building pads with the associated below grade infrastructure (i.e., electrical and plumbing) have been constructed on the auxiliary 11 acre lot, adjacent to the main property.

Sola manufactured ophthalmic lenses at the facility from 1978 through 2001. The manufacturing process involved the injection of a catalyzed, thermosetting resin into a cavity between polished glass molds. The mold assembly was then placed in an air oven to cure the resin. The assembly was removed from the oven and subsequently put through a cleaning process before the production was repeated. The six USTs were used to store solvents such as 1,1,1-trichloroethane (1,1,1-TCA), acetone, and methanol.

In May 1982, Sola found low concentrations of volatile organic compound (VOC) contamination in the groundwater beneath the Site, near the six USTs. In 1983, the San Francisco Regional Water Quality Control Board (Regional Board) directed Sola to investigate the contamination, and 1,1-

dichloroethane (1,1-DCA), 1,1-dichloroethene (1,1-DCE), methylene chloride, and 1,1,1-TCA were identified in the groundwater. In July 1985, Sola excavated and removed the six USTs. When the tanks were removed, there were no signs of leakage from the tanks; however, observations of the tank fill pipes and surrounding backfill showed staining on the pipes and in the adjacent backfill. It was concluded that the groundwater contamination might be a result of accidental spillage adjacent to, or leakage from, the fill pipes.

The tank removal included excavation of gravel backfill materials and three to five feet of native soil from the sides and bottom of the excavation pit. Confirmation sampling identified the presence of three contaminants: acetone, 1,1-DCE, and trans-1,2-dichloroethene. Based on these findings, an additional two feet of soil was excavated from the eastern wall of the former tank area. Further confirmation sampling demonstrated the presence of VOCs, including acetone. No additional excavation was performed.

In July 1986, soil gas samples were collected from 40 locations, ranging from three to five feet bgs, to determine if VOCs were migrating from shallow groundwater and to aid in selection of locations for groundwater monitoring and extraction wells. Chemicals detected in the soil gas included: chloroform, carbon tetrachloride, 1,1-DCA, 1,1-DCE, tetrachloroethene (PCE), and 1,1,1-TCA. Maximum concentrations were found approximately 70 feet downgradient from the location of the former USTs.

In 1987, the Regional Board ordered Sola to construct and operate a groundwater extraction and treatment system (GWTS). Sola conducted the activities, with the treated groundwater being discharged into Adobe Creek, just northwest of the Site, under a permit from the Regional Board. The extraction and treatment system began operating in 1988. Sola also arranged to have the City of Petaluma shut down the nearby municipal water supply well, to avoid interference with the groundwater clean-up efforts and prevent potential use of Site-impacted groundwater.

In 1989, EPA became the lead regulatory agency for remedial activities at the Site. On June 24, 1988, the Site was proposed for NPL Listing (53 Fed.Reg. 23987). On February 21, 1990, EPA added the Site to the National Priorities List of Superfund sites (55 Fed.Reg. 6153). Soon thereafter, EPA issued an administrative order directing Sola to conduct further environmental sampling and to prepare a remedial investigation report and a feasibility study of clean-up options, both of which Sola completed in 1991.

Ongoing or Potential Redevelopment

The 35-acre Sola property is zoned for industrial use. Land-use in the surrounding area is industrial, commercial, residential, and undeveloped land. The adjacent property to the west of the Site was previously owned by Stero Company, a manufacturer of dishwashers. There are residential subdivisions to the north and northwest of the Site, approximately 200 feet away. Property east of the Site is used for office space and the Harvest Christian School.

The approximately 11-acre (889,060 square feet) previously undeveloped auxiliary lot in the southwest portion of the Site was purchased by RNM Cader, L.L.C. (RNM) for development in approximately 2001. An asphalt parking lot and four building pads with the associated below grade infrastructure were constructed between 2005 and 2010. The approximately 24-acre main lot of the Sola property, including the buildings, was sold to Kland, L.L.C. in 2002. The buildings include the original manufacturing building, the adjoining administration office building, and a parking lot surrounding the buildings. Three commercial tenants currently occupy the Site building: Petaluma Poultry, Reynolds Packaging, and Scott Laboratories. Petaluma Poultry conducts sales and distribution of poultry; Reynolds Packaging conducts storage and distribution of food packaging materials; and Scott Laboratories conducts manufacturing and finishing of cork for the wine industry.

Remedial Investigation and Feasibility Study (RI/FS)

Twelve chemicals of potential concern were cited in the Record of Decision for the Site in 1991 (1991 ROD): acetone, butanone, 1,1-DCA, 1,2-dichloroethane (1,2-DCA), 1,1-DCE, Freon 113, 4-methyl-2-pentanone, PCE, toluene, 1,1,1-TCA, 1,1,2-trichloroethane (1,1,2-TCA), and trichloroethene (TCE). Contamination was found in the soil (acetone ranging up to 54 milligrams per kilogram (mg/kg) and 1,1-DCE at 0.051 mg/kg), and in the groundwater (primarily 1,1-DCA, 1,1-DCE, 1,1,1-TCA, and Freon-113). The highest contaminant concentration in groundwater was 1,1-DCE (3,300 micrograms per liter [μg/L]), detected in shallow well W–14 located downgradient of the former UST area. The wells on the downgradient edge of the Site indicated that the VOC contamination at the edge of the Sola property was at or below the clean-up standards.

The risk assessment presented in the 1991 ROD indicated an excess lifetime cancer risk based on use of on-site contaminated groundwater for drinking water of 1×10^{-4} (1 person out of 10,000 people), primarily from 1,1-DCE. The non-carcinogenic risk estimate for contaminated groundwater indicated that no adverse non-carcinogenic health effects were expected.

The ecological assessment identified Adobe Creek as the closest surface water body to the Site and as a site of a local project to reintroduce anadromous steelhead trout to the creek. However, water quality samples from groundwater monitoring wells installed between the Sola property and Adobe Creek did not detect any contaminants, indicating that discharge of contaminants to surface water had not occurred. In addition, contaminants detected in groundwater at the Site were below their corresponding federal surface water quality criteria for the protection of aquatic life.

Selected Remedy

EPA issued the ROD on September 27, 1991. The Remedial Action Objective (RAO) was to restore groundwater to its beneficial use, which is drinking water. The 1991 ROD determined that an expanded GWTS was the most appropriate method for remediating contamination at the Site. The selected site remedy consisted of the following elements:

- Groundwater monitoring to assure capture of contaminated groundwater and to demonstrate restoration of groundwater to cleanup standards throughout the aquifer
- Operation of existing extraction wells (8)
- Construction and operation of two additional shallow extraction wells
- Conversion of monitoring wells LF–13 and LF–17 to deep extraction wells
- Construction and operation of additional piping for the new and converted wells
- On-site treatment and discharge off-site or to the City of Petaluma sewage treatment system.

A ROD Amendment was signed on March 30, 2007, modifying the 1991 ROD but leaving intact its remedial action objective of restoring groundwater to its beneficial use as drinking water. The 2007 ROD Amendment addressed two issues: (1) groundwater clean-up, and (2) Institutional Controls (ICs). The ROD Amendment includes the following elements:

- Monitored Natural Attenuation (MNA) to achieve groundwater clean-up standards
- ICs to protect against inappropriate use of the contaminated groundwater until the clean-up standards are achieved
- Monitoring of both components until clean-up standards are achieved and sustained.

Response Actions

Sola expanded the system in 1992, pursuant to the 1991 ROD and a Unilateral Administrative Order issued by EPA, and continued its operations. EPA signed an ''Interim Close-out Report'' in 1992 to document completion of the construction and operability of the system. This report served as the Preliminary Close-out Report and as the Remedial Action Report.

The system was expected to restore the shallow groundwater to clean-up standards within 15–20 years. Initially, concentrations of the VOC contamination decreased significantly. By 1997, however, the rate of contaminant reduction had decreased. Groundwater monitoring data at four wells showed that concentrations of two contaminants, 1,1-DCE and 1,1,-DCA, appeared to have stabilized and reached an asymptote at levels above the clean-up standards. Continued monitoring reflected no further reductions in contaminant concentrations. Some areas of the contaminated aquifer had achieved the clean-up standard of 5 parts per billion for 1,1-DCA but not the entire plume. The extraction and treatment system was no longer effectively removing these lower concentrations of contaminants from the groundwater. As a result, Sola shut off the extraction and treatment system and monitored the groundwater.

The concentrations of the two remaining contaminants slowly declined. In 2001, Sola analyzed the data gathered since system shut-down in 1997 and presented its evaluation of MNA, following EPA guidance. Sola's evaluation concluded that extraction and treatment alone would not be capable of achieving the clean-up standard for the remaining areas, but MNA likely would be. EPA indicated it would proceed with amending the 1991 ROD to establish MNA as the new remedy. The extraction and treatment system was decommissioned in 2002.

Sampling results showed concentrations of the two contaminants continuing to decline. In March 2007, EPA signed the ROD Amendment that formally selected MNA and ICs. No additional facilities were constructed for the implementation of the ROD Amendment.

Sola conducted the semi-annual sampling through December 2009, followed by one groundwater monitoring event conducted in 2010, none in 2011, and one in 2012. In 2012, EPA determined that the clean-up standards had been achieved and sustained, as documented in a Remedial Action Report for the MNA remedy, signed on May 11, 2012.

Institutional Controls

The 2007 ROD Amendment added a requirement that ICs be implemented to protect against inappropriate use of the contaminated groundwater until the clean-up standards are achieved.

The IC that has been implemented at the Site involves the local well permitting department, the County of Sonoma Permit and Resource Management Department (CSPRMD) placing a note within its system, indicating that the parcel is part of a Superfund site and that well permits should not be issued before consulting with the CSPRMD and EPA. If anyone requests a permit for the Sola Site parcel, this note would appear. This control was implemented in October 2011 (Sonoma County, 2011).

Cleanup Goals

Site closure criterion was agreed upon by the Site team in January 2006, in response to recommendations presented in the five-year review report. It was agreed that groundwater monitoring at well W–27 would be continued until it was demonstrated that the cleanup goal for 1,1-DCA (i.e., the California Maximum Contaminant Limit (MCL) of 5 μg/l) and other VOCs had been maintained for four consecutive semiannual sampling events, or a minimum of two years. At that time, 1,1-DCA was the only constituent whose concentration in groundwater remained above the MCL.

The 1,1-DCA concentrations in well W–27 have been below the MCL in three of the last four monitoring events, and have remained below the MCL since June 2010 (greater than two years). In addition, the July 2012 1,1-DCA concentration is the lowest ever detected in this well, indicating the continued attenuation of 1,1-DCA. The 1,1-DCE concentration has also decreased from the June 2010 concentration to below the laboratory reporting limit of 0.5 μg/l.

The decreasing trend of 1,1-DCA concentrations in well W–27 was assessed using both the concentration-versus-time graph and a Mann-Kendall trend analysis.

Based on the two consecutive years of VOC concentrations below their respective MCLs and the decreasing concentration trend, EPA believes the groundwater cleanup standards have been achieved and the Site can be closed-out.

Operation and Maintenance

No operation and maintenance (O&M) activities are required at this site. All clean-up goals have been met, consisting of attaining drinking water MCL standards in the groundwater. No further remedial actions or O&M thereof are required. No ICs are required to remain in place.

Five-Year Review

No further five-year reviews will be conducted, as they are no longer required. No wastes were left in place above an unlimited use, unrestricted exposure level. To date, three five-year reviews have been conducted. These reviews were conducted because contaminant levels in the groundwater exceeded the ROD clean-up standards. The groundwater has since attained all clean-up standards.

Summary of Last Five-Year Review

The most recent five-year review was completed in September 2010 and contained the following Protectiveness Statement: ''The remedy at the Sola Site currently protects human health and the environment because the groundwater contamination has been reduced below drinking water standards (MCLs) in all but a very limited area around one well, no exposure pathways to the remaining contamination exist, and no one is using the groundwater resource. However, in order for the remedy to be protective in the long-term, the following actions need to be taken: The well permitting restriction IC within the CSPRMD Permits Plus system must be properly implemented to ensure the protectiveness of the remedy. Determine whether the restrictive covenant IC is required to protect human health in the short-term, and implement it if so.'' As a result, EPA has insured proper implementation of the well permitting restriction IC and has determined that the restrictive covenant IC was not needed because the groundwater clean-up standard had been attained.

Community Involvement

Public participation activities have been satisfied as required in CERCLA Section 113(k), 42 U.S.C. 9613(k), and CERCLA section 117, 42 U.S.C. 9617. Community involvement activities were conducted at the site, as required, during major steps of the CERCLA process, including the 1991 Record of Decision, 2007 Record of Decision Amendment, and the 2000, 2005 and 2010 Five Year Reviews. Such community involvement activities included making site documents available to the public, publishing public notices in local newspapers, and providing public comment opportunities.

EPA's community involvement activities associated with this deletion will consist of placing the deletion docket in the local site information repository and placing a public notice (of EPA's intent to delete the site from the NPL) in a local newspaper of general circulation.

Determination That the Site Meets the Criteria for Deletion in the NCP

The implemented remedy achieves the degree of cleanup specified in the ROD and ROD Amendment for all pathways of exposure. All selected remedial action objectives and clean-up goals are consistent with agency policy and guidance. No further Superfund responses are needed to protect human health and the environment at the Site.

The NCP (40 CFR 300.425(e)) states that a site may be deleted from the NPL when no further response action is appropriate. EPA, in consultation with the State of California, has determined that all required response actions have been implemented, and no further response action by the responsible parties is appropriate.

V. Deletion Action

The EPA, with concurrence of the State of California through the California Regional Water Quality Control Board—San Francisco Bay Region, has determined that all appropriate response actions under CERCLA have been completed. Therefore, EPA is deleting the Site from the NPL.

Because EPA considers this action to be noncontroversial and routine, EPA is taking it without prior publication. This action will be effective September 23, 2013 unless EPA receives adverse comments by August 23, 2013. If adverse comments are received within the 30-day public comment period, EPA will publish a timely withdrawal of this direct final notice of deletion before the effective date of the deletion, and it will not take effect. EPA will prepare a response to comments and continue with the deletion process on the basis of the notice of intent to delete and the comments already received. There will be no additional opportunity to comment.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: July 15, 2013.

Jane Diamond,

Director, Water Division, U.S. EPA Region 9.

For the reasons set out in this document, 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

■ 1. The authority citation for part 300 continues to read as follows:

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.

■ 2. Table 1 of Appendix B to part 300 is amended by removing the entry ''Sola Optical U.S.A., Inc.'', ''Petaluma''.

[FR Doc. 2013–17828 Filed 7–23–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

42 CFR Part 5

Designation of Health Professional(s) Shortage Areas

CFR Correction

■ In Title 42 of the Code of Federal Regulations, Parts 1 to 399, revised as of October 1, 2012, on page 80, in Appendix C to Part 5, in Part III, paragraph c.1., following the phrase ''as having a mental health professional(s)'', insert the word ''shortage'' before the comma.

[FR Doc. 2013–17858 Filed 7–23–13; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

42 CFR Part 137

Tribal Self-Governance

CFR Correction

In Title 42 of the Code of Federal Regulations, Parts 1 to 399, revised as of October 1, 2012, on page 932, in the second column, the heading ''Subpart P—Secretarial Responsibilities'' is corrected to read ''Subpart O—Secretarial Responsibilities''.

[FR Doc. 2013–17859 Filed 7–23–13; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1141

[Docket No. EP 715]

Rate Regulation Reforms

AGENCY: Surface Transportation Board.

ACTION: Final rules.

SUMMARY: The Surface Transportation Board (Board) changes some of its existing regulations and procedures concerning rate complaint proceedings. The Board previously created two simplified procedures to reduce the time, complexity, and expense of rate cases. The Board now modifies its rules to remove the limitation on relief for one simplified approach, and to raise the relief available under the other simplified approach. The Board also makes technical changes to the full and simplified rate procedures; changes the interest rate that railroads must pay on reparations if they are found to have charged unreasonable rates; and announces future proceedings on options for addressing cross-over traffic and on proposals to address the concerns of small agricultural shippers. The purpose of these actions is to ensure that the Board's simplified and expedited processes for resolving rate disputes are more accessible.

DATES: These rules are effective on August 17, 2013.

ADDRESSES: Information or questions regarding these final rules should reference Docket No. EP 715 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: Lucille Marvin, The Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Board modifies some of its existing regulations and procedures regarding rate complaint proceedings and announces two future proceedings. The Board's actions are discussed in five parts. Part I addresses refinements to the Simplified-SAC test, removing the limit on relief and requiring a more precise calculation of RPI. Part II addresses an increase to the limit on relief for a case brought under the Three-Benchmark test to $4 million. Part III discusses the decision not to curtail the use of cross-over traffic in the Full-SAC test at this time, instead announcing a future proceeding to address this issue in more detail, and modifies the revenue allocation methodology for cross-over traffic. Part IV sets out the change in the interest rate carriers must pay shippers when the rate charged has been found unlawfully high (from the current T-bill rate to the U.S. Prime Rate, as published in the *Wall Street Journal*). Part V describes the concern that, even with changes to the limitations on relief for simplified rate cases, shippers of agricultural commodities may still not have a viable means of challenging rail rates, and announces the Board's intent to institute a separate proceeding to explore this concern more closely.

Additional information is contained in the Board's decision served on July 18, 2013. To obtain a copy of this decision, visit the Board's Web site at *http://www.stb.dot.gov.* Copies of the decision may also be purchased by contacting the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238.

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. 5 U.S.C. 601–604. The impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the rule. *White Eagle Coop. Ass'n* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009). An agency has no obligation to conduct a small entity impact analysis of effects on entities that it does not regulate. *United Dist. Cos.* v. *FERC,* 88 F.3d 1105, 1170 (D.C. Cir. 1996). Under § 605(b), an agency is not required to perform an initial or final regulatory flexibility analysis if it certifies that the proposed or final rules will not have a ''significant impact on a substantial number of small entities.''

The rule changes adopted here will not have a significant economic impact upon a substantial number of small entities, within the meaning of the Regulatory Flexibility Act.[1] The changes impose no additional reporting or recordkeeping requirements on small railroads. Nor do these changes circumscribe or mandate any conduct by small railroads that is not already required by statute: The establishment of reasonable transportation rates. Small railroads have always been subject to rate reasonableness complaints and their associated litigation costs. And they have been subject to simplified rate procedures since 1996. Finally, as the Board has previously concluded, the majority of railroads involved in these rate proceedings are not small entities within the meaning of the Regulatory Flexibility Act.[2] In the 32 years since the passage of the Staggers Act—when Congress limited the Board's rate reasonableness jurisdiction to where a carrier has market dominance over the transportation at issue—virtually all rate challenges have involved Class I carriers. Therefore, the Board certifies under 5 U.S.C. 605(b) that these rules will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1141

Administrative practice and procedure.

Decided: July 18, 2013.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

Jeffrey Herzig,

Clearance Clerk.

■ For the reasons set forth in the preamble, the Surface Transportation Board revises part 1141 of title 49, chapter X, of the Code of Federal Regulations to read as follows:

PART 1141—PROCEDURES TO CALCULATE INTEREST RATES

Authority: 49 U.S.C. 721.

[1] The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business. *See* 13 CFR 121.201. The SBA has established a size standard for rail transportation, stating that a line-haul railroad is considered small if its number of employees is 1,500 or less, and that a short line railroad is considered small if its number of employees is 500 or less. *Id.* (industry subsector 482).

[2] *See Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1), slip op. at 33–34 (STB served Sept. 5, 2007), *aff'd sub nom. CSX Transp., Inc.* v. *STB,* 568 F.3d 236 (D.C. Cir.), *vacated in part on reh'g,* 584 F.3d 1076 (D.C. Cir. 2009).

§ 1141.1 Procedures to calculate interest rates.

(a) For purposes of complying with a Board decision in an investigation or complaint proceeding, interest rates to be computed shall be the most recent U.S. Prime Rate as published by The Wall Street Journal. The rate levels will be determined as follows:

(1) For investigation proceedings, the interest rate shall be the U.S. Prime Rate as published by The Wall Street Journal in effect on the date the statement is filed accounting for all amounts received under the new rates.

(2) For complaint proceedings, the interest rate shall be the U.S. Prime Rate as published by The Wall Street Journal in effect on the day when the unlawful charge is paid. The interest rate in complaint proceedings shall be updated whenever The Wall Street Journal publishes a change to its reported U.S. Prime Rate. Updating will continue until the required reparation payments are made.

(b) For investigation proceedings, the reparations period shall begin on the date the investigation is started. For complaint proceedings, the reparations period shall begin on the date the unlawful charge is paid.

(c) For both investigation and complaint proceedings, the annual percentage rate shall be the same as the annual nominal (or stated) rate. Thus, the nominal rate must be factored exponentially to the power representing the portion of the year covered by the interest rate. A simple multiplication of the nominal rate by the portion of the year covered by the interest rate would not be appropriate because it would result in an effective rate in excess of the nominal rate. Under this ''exponential'' approach, the total cumulative reparations payment (including interest) is calculated by multiplying the interest factor for each period by the principal amount for that period plus any accumulated interest from previous periods. The ''interest factor'' for each period is 1.0 plus the interest rate for that period to the power representing the portion of the year covered by the interest rate.

[FR Doc. 2013–17783 Filed 7–23–13; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 121004515–3608–02]

RIN 0648–BC63

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery off the Southern Atlantic States; Amendment 28

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 28 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP), as prepared by the South Atlantic Fishery Management Council (Council), and to set the commercial and recreational ACLs and fishing seasons for red snapper for the 2013 fishing year. Amendment 28 and this final rule establish a process for determining whether limited commercial and recreational fishing seasons for red snapper in or from the South Atlantic exclusive economic zone (EEZ) can occur during a given fishing year, beginning in 2013. Amendment 28 specifies the process and formulas for setting commercial and recreational annual catch limits (ACLs) for red snapper during limited fishing seasons. Amendment 28 and this final rule also establish management measures for red snapper during limited fishing seasons, including eliminating the red snapper minimum size limit, establishing a recreational bag limit, and establishing a commercial trip limit for red snapper. NMFS has determined that limited commercial and recreational fishing seasons can occur in 2013. Therefore, this final rule specifies the commercial and recreational ACLs for 2013, the opening and closing dates of the 2013 recreational fishing season, and the opening date of the 2013 commercial fishing season for South Atlantic red snapper. The purpose of this final rule is to continue rebuilding red snapper to sustainable levels and provide socio-economic benefits to snapper-grouper fishermen and communities that utilize the red snapper resource.

DATES: This rule is effective August 23, 2013.

ADDRESSES: Electronic copies of Amendment 28, which includes an environmental assessment and a regulatory impact review, may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov/sf/pdfs/SGAmend28.pdf*.

FOR FURTHER INFORMATION CONTACT: Rick DeVictor, Southeast Regional Office, telephone: 727–824–5305, or email: *rick.devictor@noaa.gov*.

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic, which includes red snapper, 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 March 12, 2013, NMFS published a notice of availability for Amendment 28 and requested public comment (78 FR 15672). On April 29, 2013, NMFS published a proposed rule for Amendment 28 and requested public comment (78 FR 25047). NMFS approved Amendment 28 on June 11, 2013. The proposed rule and Amendment 28 outline the rationale for the actions contained in this final rule. A summary of the actions implemented by Amendment 28 and this final rule is provided below.

Management Measures Contained in this Final Rule and Amendment 28

Process for Determining the Limited Annual Harvest of Red Snapper

Amendment 28 describes the annual process developed by the Council for determining whether limited commercial and recreational fishing seasons for red snapper can occur and how much red snapper may be harvested. The acceptable biological catch (ABC) is determined through the Council's ABC control rule and the rebuilding projections from the most recent stock assessment. The total removals (estimated landings and dead discards) of red snapper from the previous year are available around March of each year, and NMFS will compare the total removals to the ABC each year using formulas approved by the Council in Amendment 28 to determine whether limited fishing seasons can occur.

ACLs

Amendment 28 includes formulas for determining the commercial and recreational ACLs on an annual basis. The formulas are based on total removals from prior fishing years and the formulas provide the total ACL for limited fishing seasons. If limited fishing seasons can occur, the ACL will be divided between the commercial and recreational sectors based on the current allocation ratio.

Commercial and Recreational Red Snapper Fishing Seasons

In Amendment 28, the Council decided that if limited fishing seasons can occur, the commercial fishing season should begin on the second Monday in July, and the recreational fishing season, which would consist of weekends only (Fridays, Saturdays, and Sundays) on the second Friday in July. If the fishing seasons do not open exactly on these dates, they would open as close to these dates as possible. The Council also decided that if the projected commercial or recreational fishing season is determined by NMFS to be 3 days or less, then the commercial or recreational fishing season would not open for that fishing year.

If the NMFS Regional Administrator (RA) determines that tropical storm or hurricane conditions exist, or are projected to exist, in the South Atlantic during the commercial or recreational fishing seasons, this rule will allow the RA to modify the opening and closing dates by filing a notification to that effect with the Office of the Federal Register, and announcing via NOAA Weather Radio and Fishery Bulletin any change in the red snapper commercial or recreational fishing seasons.

AMs

During limited red snapper fishing seasons, the Council and NMFS have established in-season AMs to prevent the ACLs from being exceeded. The recreational AM is the length of the red snapper recreational fishing season, as determined for a specific fishing year. After the recreational sector closes, the bag and possession limits for red snapper are zero. The commercial AM is that when commercial landings reach or are projected to reach the commercial ACL, NMFS will close the commercial sector for red snapper for the remainder of the fishing year. After the commercial sector closes, sale and purchase of red snapper is prohibited and harvest and possession of red snapper is limited to the bag and possession limits until the recreational fishing season closes. If both the commercial and recreational sectors are closed, it is unlawful to harvest or possess red snapper.

Other Management Measures

In order to reduce the probability of an overage of the commercial and recreational ACLs during the limited open seasons, Amendment 28 and this rule implement a 75-lb (34-kg) commercial trip limit and a 1-fish per person recreational bag limit. This rule also removes the 20-inch (51-cm), total length (TL), minimum size limit for both the commercial and recreational sectors to decrease regulatory discards of red snapper (fish returned to the water because they are less than the minimum size limit).

Red Snapper Harvest in 2013

NMFS used the formulas established in Amendment 28 to determine if harvest of red snapper could occur in 2013. The total removals (landings plus dead discards) for 2012 were compared to the 2012 ABC to determine if the ABC was exceeded and thus whether the ACL for 2013 could be set greater than zero. In 2012, total removals equaled 80,516 fish. Because the 2012 total removals for red snapper are less than the 2012 ABC of 86,000 fish, NMFS has determined that the ACL for 2013 can be set greater than zero and that limited commercial and recreational fishing seasons may be established in 2013.

NMFS has determined that the total ACL for 2013 is 13,325 fish. Based on the current allocation ratio for red snapper (28.07 percent commercial and 71.93 percent recreational), the 2013 commercial ACL is 21,447 lb (9,728 kg), gutted weight, and the 2013 recreational ACL is 9,585 fish.

Based on the 2013 commercial and recreational ACLs and the catch rates from 2012, NMFS has determined the length of the commercial and recreational fishing seasons for 2013. The ''2013 South Atlantic Red Snapper Annual Catch Limit and Season Length Projections,'' described in SERO–LAPP–2013–04, can be found at *http://sero.nmfs.noaa.gov/sustainable_fisheries/s_atl/sg/documents/pdfs/sa_rs_acl_season_projections.pdf.* Based on the projections, NMFS has determined that the recreational fishing season in 2013 will be open for one weekend consisting of 3 days (Friday, Saturday, Sunday). Although the Council prefers to open the recreational and commercial fishing seasons in July, because of the required time for the rulemaking process for Amendment 28, the recreational and commercial fishing seasons will open in August for the 2013 fishing year. The Council determined that opening in July (or August) would decrease the chances of inclement weather, thus promoting safety-at-sea and increasing the chance of small vessels being able to target red snapper. The recreational fishing season will open at 12:01 a.m. on August 23, 2013, and close at 12:01 a.m. on August 26, 2013. After the recreational sector closes, harvest and possession of red snapper under the bag limit is prohibited. NMFS has determined that the commercial fishing season in 2013 will open at 12:01 a.m. on August 26, 2013, and NMFS will monitor commercial harvest in-season and close the commercial sector when the commercial ACL is reached or projected to be reached by filing an in-season closure notification with the Office of the Federal Register. After the commercial sector closes, the harvest and possession and sale and purchase of red snapper in or from the South Atlantic EEZ are prohibited.

Comments and Responses

A total of 63 comments were received on Amendment 28 and the proposed rule from individuals, commercial and recreational fishing associations, and two environmental organizations. Many commenters expressed support for red snapper fishing seasons because they have been encountering numerous red snapper while fishing and therefore believe that the red snapper stock is healthy enough to support increased harvest. Some commenters stated that the allowable harvest, bag limits, and trip limits contained in this final rule are too restrictive. Specific comments related to the actions contained in Amendment 28 and the proposed rule, and NMFS' respective responses are summarized below.

Comment 1: Numerous commercial and recreational fishermen stated that the red snapper stock is healthy and the proposed regulations would be overly restrictive. Recreational fishermen suggested a higher quota, a year-round season, 2-month closures during red snapper spawning periods, and a higher bag limit of two to five fish per person per day.

Response: South Atlantic red snapper are overfished and undergoing overfishing and their harvest has been prohibited since 2010. These regulations are intended to prevent overfishing of red snapper, while minimizing the potential adverse economic impacts from the closure.

A limited season to harvest red snapper and a conservative bag limit are necessary management measures to constrain the harvest to the ACL. A higher bag limit (*e.g.,* two to five fish per person per day) would translate into an even shorter limited fishing season. The Council and NMFS determined that these regulations would allow a sustainable level of harvest consistent with the rebuilding plan for red snapper.

Comment 2: A fishing organization favored a 100-lb (45-kg) trip limit instead of the 75-lb (34-kg) trip limit, as contained in this final rule. A commercial fisherman stated that the 75-lb (34-kg) trip limit would only cover trip expenses and suggested that the trip limit should be increased to 150–200 lb (68–91 kg) to see a serious effort from the commercial sector. Another fisherman stated a 200-lb (91 kg) trip limit with a shortened fishing season would be a more economically-feasible option.

Response: The Council concluded that a 75-lb (34-kg) trip limit would promote full harvest of the commercial ACL and help achieve the optimum yield for red snapper. The commercial trip limit during the 2012 limited season was 50 lb (23 kg), gutted weight, and commercial landings in 2012 were lower than the 2012 commercial ACL. However, as trip limits increase, the rate at which the commercial ACL is harvested also increases. A 75-lb (34-kg) trip limit represents a precautionary increase to the 50-lb (23 kg) trip limit implemented for 2012. A higher trip limit with its corresponding higher rate of harvest could result in shorter commercial seasons and would likely lead to a derby fishery.

Comment 3: Numerous fishermen disagreed with the removal of the minimum size limit. Some stated that the minimum size limit was necessary to protect the breeding stock. Others stated that removal of the size limit would promote culling of fish (the practice of selectively landing fish so that only the largest fish are retained), which would lead to additional red snapper mortality. Some fishermen suggested retaining the 20-inch (51-cm) minimum size limit for both sectors; others recommended implementing a 16-inch (41-cm) minimum size limit for the commercial sector. Some fishermen suggested slot limits to preserve the breeding stock (*e.g.,* 16 to 20 inches (41–51 cm) and 15 to 22 inches (38–56 cm)). Others suggested prohibiting the release of red snapper within the bag limits, *i.e.,* fishermen would be required to keep what they catch.

Response: Because a large portion of released red snapper do not survive the trauma of capture, the Council and NMFS decided that removal of a minimum size limit is likely to reduce dead regulatory discards. Removing the minimum size limit should also have a positive effect on the breeding population because red snapper release mortality is high and red snapper begin spawning at a young age (as young as 1-year old fish) and at small sizes. However, the net effect of removing the minimum size limit on the number of regulatory discards is unknown. A fisherman may cull his catch regardless of whether a minimum size limit is in effect for red snapper. NMFS and the Council have determined that removing the minimum size limit and allowing a fisherman to keep the first fish caught, regardless of its size, should both protect the breeding stock and decrease regulatory discards because the fish will not have to be returned to the water.

Prohibiting the release of red snapper caught within the bag limits was discussed by the Council at its June 2012 meeting. However, the U.S. Coast Guard stated that this requirement would not be enforceable, therefore, the Council decided not to include this requirement in Amendment 28.

Comment 4: One fisherman stated that a mid-September fishing season would be better for fishermen in North Florida compared to the July fishing season, as contained in this final rule. The commenter stated that fish are offshore in July and too far offshore for small boat owners. The commenter also stated that tournaments occur in July which would conflict with a July fishing season and would increase traffic at the boat ramps.

Response: NMFS and the Council determined that having a limited fishing season in July (or in August for the 2013 fishing year) should decrease the chances of inclement weather events, thus promoting safety-at-sea and increasing the opportunity for small vessels to participate in the limited season. The Council also determined that a season beginning in July (or in August for the 2013 fishing year) would allow for better weather during a second opening of the fishing season, if a reopening was necessary as was the case for the commercial sector in 2012. In 2012, NMFS received many complaints from the recreational fishing community that inclement weather during the September weekends prevented fishermen, particularly those with smaller vessels, from participating in the limited red snapper fishing season. In addition, representatives of the state natural resource agencies reported that fishing effort was limited during the September 2012 fishing season off the coasts of North Carolina, South Carolina and Georgia, primarily due to adverse weather conditions. Therefore, the Council reasoned that a start date prior to September would promote increased recreational effort in all the southeastern Atlantic states, and would increase the likelihood that the entire recreational ACL would be harvested while allowing more fair and equitable access to red snapper.

Comment 5: One fishing organization preferred the fishing seasons for both commercial and recreational red snapper to be set in June. They stated that a June fishing season for red snapper would overlap with the fishing season for black sea bass and would help solve the problem of red snapper bycatch and dead discards when fishermen target black sea bass. Another commenter preferred a fishing season for the commercial sector when grouper are closed (January through April each year) so that commercial fishermen have a way to make a living during this time.

Response: NMFS and the Council decided that opening the fishing season in July (or in August for the 2013 fishing year) would be effective in reducing discards of red snapper because it is likely that the red snapper fishing season, if it is to occur, would occur during the black sea bass fishing season. The fishing season for black sea bass begins on June 1, and recreational harvest of black sea bass has never been prohibited after one month of fishing, therefore, a July (or August) red snapper fishing season is just as likely to overlap with the black sea bass season as a June fishing season. Also, the Council has approved an amendment to more than double the black sea bass ACL, which if implemented, is expected to extend the length of the commercial and recreational fishing seasons for black sea bass.

In addition, Amendment 28 establishes a process to determine if harvest of red snapper would be allowed each year. As stated in the amendment, the red snapper estimated landings and dead discards that occurred in the previous year would first become available around March of each year. At that time, NMFS would begin the evaluation of red snapper landings and total removals to determine if a season can occur. The goal is to ensure that the most accurate and complete set of landings and total removals are used while also providing as much notice to fishermen as possible to prepare for a limited red snapper fishing season. Season start dates of January through April or June are problematic because the estimated landings and dead discards from the previous year are typically not available until March, and if a limited fishing season can occur, adequate notice of that season needs to be given to fishermen and other members of the public.

Comment 6: Some commenters want the recreational fishing seasons to occur on all days of the week, not just weekends. One commenter, a retiree, reported that he did not want to fish when ''weekend warriors'' were around. Another commenter stated that work prevented him from fishing on weekends. One commenter wants to start the commercial and recreational fishing seasons on the same day.

Response: The majority of recreational fishermen fish on the weekends, and weekend-only seasons would provide the majority of recreational fishermen access to the resource when they are not working. Commercial fishermen generally fish during weekdays rather than weekends; as such, the Council decided not to align the commercial and recreational sectors by starting the fishing seasons on the same day.

Comment 7: One environmental organization was concerned that based on the current recreational sampling methods and estimates for red snapper, the ACL may be exceeded without a better defined method to capture landings during the short red snapper fishing season. This organization encouraged the establishment of a standardized reporting method for red snapper because they believe the Marine Recreational Information Program (MRIP) is not designed to capture and estimate catch and effort with significant precision for such a short fishing season. They stated that the MRIP-calculated red snapper catch was highly imprecise and, based on MRIP's own recommendation, estimates with over a 50-percent proportional standard error are highly imprecise. The commenters noted that using one set of data (MRIP and Southeast Region Headboat Survey (SRHS)), the catch was below the 2012 recreational ACL; however, using the other data (MRIP, Florida Fish and Wildlife Conservation Commission estimates, and SHRS), the recreational ACL was exceeded.

Response: NMFS agrees that MRIP catch and effort estimates alone may be imprecise for short fishing seasons and additional sampling methods and surveys would improve the precision of catch and effort estimates of red snapper. Therefore, MRIP is not the only data source utilized to determine red snapper catch and effort information in the South Atlantic. Various standardized reporting methodologies, designed to capture recreational data, exist for all species managed by NMFS and the Council in the South Atlantic. For example, SRHS estimates recreational landings and discards from headboats in the U.S. South Atlantic and Gulf of Mexico. MRIP provides estimated catch per unit effort, total effort, landings, and discards for six 2-month periods (waves) each year. MRIP provides estimates for three recreational fishing modes: Shore-based fishing, private and rental boat fishing, and for-hire charter and guide fishing. Both SRHS and MRIP were used to provide estimates for red snapper mortality during 2012, and will be used in 2013.

In addition to SRHS and MRIP, an intensive sampling program was developed and implemented by all South Atlantic states for the 2012 limited fishing season for red snapper. The goal of the sampling program was to capture fishery-dependent charter and private angler data from the 6-day recreational red snapper season. Numerous survey methods were used within the sampling program to provide estimates of red snapper harvest for private boat and for-hire modes. In Florida and Georgia, these methods included a telephone survey of federally-permitted charter vessel operators to obtain catch and effort information. In South Carolina, logbooks were used to estimate charter vessel landings. In Florida, a boat-level angler intercept survey was used to obtain catch information for directed recreational trips and an inlet-based boat count survey was used to determine directed effort. Monitoring efforts also included a carcass drop-off program and tournament sampling, as well as integrated sampling of the private boat and for-hire modes for biological information and otoliths. The intent of NMFS and the states is to continue this expanded red snapper sampling program to help capture fishery dependent charter and private angler data from future red snapper seasons as they occur.

Comment 8: One environmental organization recommended that in order to mitigate some of the uncertainty in estimating the catch and effort through MRIP, the Council should, at a minimum, establish an annual catch target (ACT) for the recreational sector for red snapper.

Response: The Council did not establish an ACT during a limited red snapper fishing season because the Council determined that prescribing the exact number of fishing days allowed for the recreational sector, coupled with a one-fish bag limit, are the appropriate management controls necessary to constrain the recreational sector to its ACL. After the recreational fishing season closes, the bag and possession limits for red snapper revert back to zero, and it is unlawful to harvest or possess red snapper.

As outlined in the response to the previous comment, an intensive sampling program was developed and implemented by all the South Atlantic states to capture fishery dependent charter and private angler data from the 2012 6-day recreational red snapper season, and this program will be used in 2013 as well.

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) into a new format, and changed the section headings for the various management measures for each fishery. The proposed rule for Amendment 28 contained an incorrect section heading in the proposed codified text (it referenced the old section heading instead of the new section heading). In § 622.191, there was a reference to § 622.49(b)(25)(i) which is now § 622.193(y)(1). This final rule corrects that reference.

Classification

The Regional Administrator, Southeast Region, NMFS has determined that this final rule is necessary for the conservation and management of South Atlantic red snapper and is consistent with Amendment 28, the 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 rule would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination 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. As a result, a final regulatory flexibility analysis is not required and none was prepared.

List of Subjects in 50 CFR Part 622

Accountability measure, Annual catch limit, Fisheries, Fishing, Red snapper, South Atlantic.

Dated: July 19, 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 OF MEXICO, 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 § 622.181, paragraph (b)(2) is revised to read as follows:

§ 622.181 Prohibited and limited-harvest species.

* * * * *

(b) * * *

(2) *Red snapper.* Red snapper may not be harvested or possessed in or from the South Atlantic EEZ, except if NMFS determines a limited amount of red snapper may be harvested or possessed in or from the South Atlantic EEZ, as specified in § 622.193(y). Red snapper caught in the South Atlantic EEZ must be released immediately with a minimum of harm. In addition, for a person on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, the prohibition on the harvest or possession of red snapper applies in the South Atlantic, regardless of where such fish are harvested or possessed, *i.e.,* in state or Federal waters.

* * * * *

■ 3. In § 622.183, paragraph (b)(5) is added to read as follows:

§ 622.183 Area and seasonal closures.

* * * * *

(b) * * *

(5) *Closures of the commercial and recreational sectors for red snapper*—(i) The commercial and recreational sectors for red snapper are closed (*i.e.,* red snapper may not be harvested or possessed, or sold or purchased) in or from the South Atlantic EEZ, except if NMFS determines a limited amount of red snapper may be harvested or possessed in or from the South Atlantic EEZ, as specified in § 622.193(y). If NMFS determines that commercial and recreational fishing seasons for red snapper may be established in a given fishing year, NMFS will announce the season opening dates in the **Federal Register**. The recreational fishing season would consist of consecutive Fridays, Saturdays, and Sundays, unless otherwise specified. NMFS will project the length of the recreational fishing season and announce the recreational fishing season end date in the **Federal Register**. See 622.193(y), for establishing the end date of the commercial fishing season.

(ii) If the RA determines tropical storm or hurricane conditions exist, or are projected to exist, in the South Atlantic, during a commercial or recreational fishing season, the RA may modify the opening and closing dates of the fishing season by filing a notification to that effect with the Office of the Federal Register, and announcing via NOAA Weather Radio and a Fishery Bulletin any change in the dates of the red snapper commercial or recreational fishing season.

(iii) If the projected commercial or recreational fishing season is determined by NMFS to be 3 days or less, then the commercial or recreational fishing season will not open for that fishing year.

§ 622.185 [Amended]

■ 4. In § 622.185, paragraph (a)(1) is removed and reserved.

■ 5. In § 622.187, paragraphs (b)(4) and (9) are revised to read as follows:

§ 622.187 Bag and possession limits.

* * * * *

(b) * * *

(4) *Snappers, combined*—10. However, excluded from this 10-fish bag limit are cubera snapper, measuring 30 inches (76.2 cm), TL, or larger, in the South Atlantic off Florida, and red snapper and vermilion snapper. (See § 622.181(b)(2) for the prohibitions on harvest or possession of red snapper, except during a limited recreational fishing season, and § 622.181(c)(1) for limitations on cubera snapper measuring 30 inches (76.2 cm), TL, or larger, in or from the South Atlantic EEZ off Florida.)

* * * * *

(9) *Red snapper*—0, except during a limited recreational fishing season, as specified in § 622.183(b)(5), during which time the bag limit is 1 fish.

* * * * *

■ 6. In § 622.191, paragraph (a)(9) is added to read as follows:

§ 622.191 Commercial trip limits.

* * * * *

(a) * * *

(9) *Red snapper.* During a limited commercial fishing season, as specified in § 622.183(b)(5), and until the commercial ACL specified in § 622.193(y)(1) is reached, 75 lb (34 kg), gutted weight. See § 622.193(y)(1) for the limitations regarding red snapper after the commercial ACL is reached.

* * * * *

■ 7. In § 622.192, paragraph (j) is revised to read as follows:

§ 622.192 Restrictions on sale/purchase.

* * * * *

(j) No person may sell or purchase a red snapper harvested from or possessed in the South Atlantic, *i.e.,* state or Federal waters, by a vessel for which a Federal commercial vessel permit for South Atlantic snapper-grouper has been issued, except if NMFS determines a limited commercial fishing season for red snapper is allowable, as specified in § 622.183(b)(5).

■ 8. In § 622.193, paragraph (y) is added to read as follows:

§ 622.193 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).

* * * * *

(y) *Red snapper*—(1) *Commercial sector.* The commercial ACL for red snapper is zero. However, if NMFS determines that the previous year's estimated red snapper landings and dead discards are less than the ABC, limited red snapper harvest and possession may be allowed for the current fishing year and the commercial ACL value would be determined using the formula described in the FMP. The AA will file a notification with the Office of the Federal Register to announce the limited commercial ACL for the current fishing year. NMFS will monitor commercial landings during the limited season, and if commercial landings, as estimated by the SRD, reach or are projected to reach the commercial ACL, based on the formula described in the FMP, the AA will file a notification with the Office of the Federal Register to close the commercial sector for red snapper for the remainder of the year. On and after the effective date of the closure notification, all sale or purchase of red snapper is prohibited and harvest or possession of red snapper is limited to the bag and possession limits. This bag and possession limit and the prohibition on sale/purchase apply in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested or possessed, *i.e.,* in state or Federal waters.

(2) *Recreational sector.* The recreational ACL for red snapper is zero. However, if NMFS determines that the previous year's estimated red snapper landings and dead discards are less than the ABC, limited red snapper harvest and possession may be allowed for the current fishing year and the recreational ACL value would be determined using the formula described in the FMP. The AA will file a notification with the Office of the Federal Register to announce the limited recreational ACL and the length of the recreational fishing season for the current fishing year. The length of the recreational fishing season for red snapper serves as the in-season accountability measure. See § 622.183(b)(5) for details on the recreational fishing season. On and after the effective date of the recreational closure notification, the bag and possession limits for red snapper are zero.

[FR Doc. 2013–17790 Filed 7–19–13; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 120918468–3111–02]

RIN 0648–XC771

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the West Yakutat District of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific ocean perch in the West Yakutat District of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2013 total allowable catch (TAC) of Pacific ocean perch in the West Yakutat District of the GOA.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), July 19, 2013, through 2400 hours, A.l.t., December 31, 2013.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7241.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2013 TAC of Pacific ocean perch in the West Yakutat District of the GOA is 1,641 metric tons (mt) as established by the final 2013 and 2014 harvest specifications for groundfish of the (78 FR 13162, February 26, 2013).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2013 TAC of Pacific ocean perch in the West Yakutat District of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 1,541 mt, and is setting aside the remaining 100 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific ocean perch in the West Yakutat District of the GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Acting Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of directed fishing for Pacific ocean perch in the West Yakutat District of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 18, 2013.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: July 19, 2013.

Kelly Denit,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–17789 Filed 7–19–13; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 78, No. 142

Wednesday, July 24, 2013

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 151, 733, and 734

RIN 3206–AM87

Political Activity—State or Local Officers or Employees; Federal Employees Residing in Designated Localities; Federal Employees

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: OPM is issuing proposed regulations that incorporate recent amendments to the Hatch Act, update the contact information for the United States Office of Special Counsel, and update sections to conform to the Act's current provisions.

DATES: Written comments must be received on or before September 23, 2013.

ADDRESSES: Comments may be mailed to Sharon M. McGowan, Acting General Counsel, Room 7355, United States Office of Personnel Management, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Jo-Ann Chabot, Office of the General Counsel, United States Office of Personnel Management, (202) 606–1700.

SUPPLEMENTARY INFORMATION: The Hatch Act, codified at 5 U.S.C. 1501–1508, concerns the political activities of State and local employees. Section 1502 previously prohibited from candidacy for elective office certain State and local employees whose principal employment was connected with an activity financed in whole or in part with loans or grants from the United States or a Federal agency. Section 2 of Public Law 112–230 amends 5 U.S.C. 1502 by applying the prohibition against candidacy for elective office only to certain State or local employees whose salaries are paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency. OPM's proposed revision to 5 CFR 151.151 reflects this change.

Section 3 of Public Law 112–230 amends 5 U.S.C. 1501, 1502, and 1506 by treating employees of the Government of the District of Columbia as State and local employees, rather than as Federal employees. These changes are reflected in the proposed 5 CFR 151.101 and 151.122.

In addition, section 3 of Public Law 112–230 amends 5 U.S.C. 7322 by excluding employees of the Government of the District of Columbia from coverage under 5 U.S.C. 7323–7326, the Hatch Act provisions governing the political activities of Federal employees. Consequently, OPM proposes to remove references to the Government of the District of Columbia or its employees from 5 CFR 733.101, 734.101, 734.102, 734.203, 734.305, and 734.502.

Section 7325 of title 5, U.S.C., authorizes OPM to permit the Federally employed residents of certain localities to participate in some political activities that the Hatch Act otherwise would prohibit when OPM determines that, in view of special or unusual circumstances, it would be in the employees' domestic interest to permit such participation. Section 7325 specifies that these Federal employees must reside in: (1) a municipality or political subdivision in Maryland or Virginia or in the immediate vicinity of the District of Columbia, or (2) a municipality in which the majority of voters are employed by the Government of the United States. Section 3 of Public Law 112–230 amends section 7325 by including the District of Columbia as a third category. Consequently, OPM proposes to amend 5 CFR 733.107(a) to reflect this change in the statute.

Under 5 U.S.C. 7326, the penalty for violating the political activity prohibitions in 5 U.S.C. 7323 and 7324 is removal, unless the Merit Systems Protection Board by a unanimous vote imposes a penalty of not less than a 30-day suspension without pay. Section 3 of Public Law 112–230 amends section 7326 by adding a variety of lesser penalties and abolishing the requirement that the Merit Systems Protection Board must vote unanimously to impose a lesser penalty than removal. OPM proposes to revise 5 CFR 734.102(b) by adding these lesser penalties and removing the requirement for a unanimous vote in cases involving penalties other than removal. OPM also proposes to revise paragraph (a) of section 734.102 to update the contact information for the U.S. Office of Special Counsel, the Federal agency that investigates and prosecutes alleged Hatch Act violations, and provides advice concerning permissible and prohibited political activities.

Under 5 U.S.C. 7323(a), the majority of Federal employees may participate actively in most partisan political activities, except for using their official authority or influence to interfere with, or affect the result of an election; running for public office in a partisan campaign; soliciting, accepting, or receiving political contributions; and, participating in political activities while on duty, on Federal premises, in uniform, or using a Government owned or leased vehicle. Individuals in the positions or agencies identified in section 7323(b)(2) and (3), however, are more restricted and may not participate actively in partisan political activities. OPM regulations at 5 CFR 733.102, 733.105, and 734.401 no longer conform with section 7323(b)(2) and (3) because Congress had enacted various amendments to section 7323(b)(2) and (3). OPM proposes to update sections 733.102, 733.105, and 734.401 to conform to the current provisions in 5 U.S.C. 7323.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the changes will affect only employees of the Federal Government.

List of Subjects

5 CFR Part 151

Political activity—State or local officers or employees.

5 CFR Part 733

Political activity—Federal employees residing in designated localities.

5 CFR Part 734

Political activity—Federal employees.

U.S. Office of Personnel Management.
Elaine Kaplan,
Acting Director.

Accordingly, the Office of Personnel Management proposes to amend 5 CFR part 151 as follows:

PART 151—POLITICAL ACTIVITY—STATE OR LOCAL OFFICERS OR EMPLOYEES

■ 1. The authority citation for part 151 is revised to read as follows:

Authority: 5 U.S.C. 1302, 1501–1508, as amended, Reorganization Plan No. 2 of 1978, section 102, 92 Stat. 3783, 3 CFR 1978 Comp. p. 323; and E.O. 12107, section 1–102, 3 CFR 1978 Comp. p. 264.

■ 2. In § 151.101, paragraphs (b) and (d) are revised to read as follows:

§ 151.101 Definitions.

* * * * *

(b) State or local agency means:

(1) The executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof; or

(2) The executive branch of the District of Columbia, or an agency or department thereof.

* * * * *

(d) State or local officer or employee means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency but does not include—

(1) An individual who exercises no functions in connection with that activity.

(2) An individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by –

(i) A State or political subdivision thereof;

(ii) The District of Columbia; or

(iii) A recognized religious, philanthropic, or cultural organization.

* * * * *

■ 3. In § 151.121, paragraph (c) is revised to read as follows:

§ 151.121 Use of official authority; coercion; candidacy; prohibitions.

* * * * *

(c) Be a candidate for elective office if the salary of the employee is paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency.

■ 4. In § 151.122, paragraph (c) is revised to read as follows:

§ 151.122 Candidacy; exceptions.

* * * * *

(c) A duly elected head of an executive department of a State, municipality, or the District of Columbia, who is not classified under a merit or civil service system of a State, municipality, or the District of Columbia;

* * * * *

PART 733—POLITICAL ACTIVITY—FEDERAL EMPLOYEES RESIDING IN DESIGNATED LOCALITIES

■ 5. The authority citation for part 733 is revised to read as follows:

Authority: 5 U.S.C. 7325.

■ 6. In § 733.101, the definitions of *employee* and *on duty* are revised to read as follows:

§ 733.101 Definitions.

* * * * *

Employee means:

Any individual (other than the President, the Vice President, or a member of the uniformed services) employed or holding office in—

(1) An Executive agency other than the General Accounting Office;

(2) A position within the competitive service which is not in an Executive agency; or

(3) The United States Postal Service or the Postal Rate Commission.

On Duty means the period when an employee is:

(1) In a pay status other than paid leave, compensatory time off, credit hours, time off as an incentive award, or excused or authorized absence (including leave without pay); or

(2) Representing any agency or instrumentality of the United States Government in an official capacity.

* * * * *

■ 7. Section 733.102 is revised to read as follows:

§ 733.102 Exclusion of employees in the Criminal Division and National Security Division of the United States Department of Justice.

Employees in the Criminal Division and National Security Division in the Department of Justice (except employees appointed by the President by and with the advice and consent of the Senate) specifically are excluded from coverage under the provisions of this part.

■ 8. In § 733.105, paragraph (a) is revised to read as follows:

§ 733.105 Permitted Political Activities—employees who reside in designated localities and are employed in certain agencies and positions.

(a) This section applied to employees who reside in designated localities and are employed in the following agencies or positions:

(1) The Federal Election Commission;

(2) The Election Assistance Commission;

(3) The Federal Bureau of Investigation;

(4) The Secret Service;

(5) The Central Intelligence Agency;

(6) The National Security Council;

(7) The National Security Agency;

(8) The Defense Intelligence Agency;

(9) The Merit Systems Protection Board;

(10) The Office of Special Counsel;

(11) The Office of Criminal Investigation of the Internal Revenue Service;

(12) The Office of Investigative Programs of the United States Customs Service;

(13) The Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms;

(14) The National Geospatial-Intelligence Agency;

(15) The Office of the Director of National Intelligence;

(16) Career Senior Executive Service positions described in 5 U.S.C. 3132(a)(4);

(17) Administrative Law Judge positions described in 5 U.S.C. 5372;

(18) Contract Appeals Board Member positions described in 5 U.S.C. 5372a; or

(19) Administrative Appeals Judge positions described in 5 U.S.C. 5732b.

* * * * *

■ 9. In § 733.107, paragraph (a) is revised to read as follows:

§ 733.107 Designated localities.

(a) When OPM determines that, because of special or unusual circumstances, it is in the domestic interest of employees to participate in local elections, OPM may specify as a designated locality:

(1) The District of Columbia,

(2) A municipality or political subdivision in Maryland or Virginia and in the immediate vicinity of the District of Columbia, or

(3) A municipality in which the majority of voters are employed by the Government of the United States.

* * * * *

PART 734—POLITICAL ACTIVITIES OF FEDERAL EMPLOYEES

■ 10. The authority citation for part 733 continues to read as follows:

Authority: 5 U.S.C. 1103, 1104, 7325; Reorganization Plan No. 2 of 1978, 92 Stat. 3783, 3 CFR 1978 Comp. p. 323; and E.O. 12107, 3 CFR 1978 Comp. p. 264.

■ 11. In § 734.101, the definitions of *employee, employing office,* and *on duty* are revised to read as follows:

§ 734.101 Definitions.

* * * * *

Employee means any individual (other than the President, Vice President, or a member of the uniformed services) employed or holding office in—

(1) An Executive agency other than the General Accounting Office;

(2) A position within the competitive service which is not in an Executive agency; or

(3) The United States Postal Service or the Postal Rate Commission.

Employing office shall have the meaning given by the head of each agency or instrumentality of the United States Government covered by this part. Each agency or instrumentality shall provide notice identifying the appropriate employing offices within it through internal agency notice procedures.

* * * * *

On Duty means the time period when an employee is:

(1) In a pay status other than paid leave, compensatory time off, credit hours, time off as an incentive award, or excused or authorized absence (including leave without pay); or

(2) Representing any agency or instrumentality of the United States Government in an official capacity.

* * * * *

■ 12. In § 734.102, paragraphs (a) and (b) are revised to read as follows:

§ 734.102 Jurisdiction.

(a) The United States Office of Special Counsel has exclusive authority to investigate allegations of political activity prohibited by the Hatch Act Reform Amendments of 1993, as implemented by 5 CFR part 734, prosecute alleged violations before the United States Merit Systems Protection Board, and render advisory opinions concerning the applicability of 5 CFR part 734 to the political activity of Federal employees. (5 U.S.C. 1212 and 1216). Advice concerning the Hatch Act Reform Amendments may be requested from the Office of Special Counsel:

(1) By letter addressed to the Office of Special Counsel at 1730 M Street NW., Suite 218, Washington, DC 20036–4505;

(2) By telephone on (202) 254–3650, or (1–800) 854–2824;

(3) By fax on (202) 254–3700; or

(4) By email at *Hatchact@osc.gov.*

(b) The Merit Systems Protection Board has exclusive authority to determine whether a violation of the Hatch Act Reform Amendments of 1993, as implemented by 5 CFR part 734, has occurred and to impose a penalty of removal, reduction-in-grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000, for violation of the political activity restrictions regulated by this part. (5 U.S.C. 1204 and 7326).

* * * * *

■ 13. In § 734.203, paragraph (d) is revised to read as follows:

§ 734.203 Participation in nonpartisan activities.

* * * * *

(d) Participate fully in public affairs, except as prohibited by other Federal law, in a manner which does not compromise his or her efficiency or integrity as an employee or the neutrality, efficiency, or integrity of the agency or instrumentality of the United States Government in which he or she is employed.

■ 14. In § 734.305, paragraph (c) is revised to read as follows:

§ 734.305 Soliciting or discouraging the political participation of certain persons.

* * * * *

(c) Each agency or instrumentality of the United States shall determine when a matter is pending and ongoing within employing offices of the agency or instrumentality for the purposes of this part.

* * * * *

■ 15. In § 734.401, paragraph (a) is revised to read as follows:

§ 734.401 Coverage.

(a) This subpart applies to employees in the following agencies and positions:

(1) The Federal Election Commission;

(2) The Election Assistance Commission;

(3) The Federal Bureau of Investigation;

(4) The Secret Service;

(5) The Central Intelligence Agency;

(6) The National Security Council;

(7) The National Security Agency;

(8) The Defense Intelligence Agency;

(9) The Merit Systems Protection Board;

(10) The Office of Special Counsel;

(11) The Office of Criminal Investigation of the Internal Revenue Service;

(12) The Office of Investigative Programs of the United States Customs Service;

(13) The Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms;

(14) The Criminal Division of the Department of Justice;

(15) The National Security Division of the Department of Justice;

(16) The National Geospatial-Intelligence Agency;

(17) The Office of the Director of National Intelligence;

(18) Career Senior Executive Service positions described in 5 U.S.C. 3132(a)(4);

(19) Administrative Law Judge positions described in 5 U.S.C. 5372;

(20) Contract Appeals Board Member positions described in 5 U.S.C. 5372a; or

(21) Administrative Appeals Judge positions described in 5 U.S.C. 5732b.

* * * * *

■ 16. In § 734.502, paragraph (b) is revised to read as follows:

§ 734.502 Participation in political activity while on duty, in uniform, in any room or building occupied in the discharge of official duties, or using a Federal vehicle.

* * * * *

(b) For the purposes of this subpart, normal duty hours and normal duty post will be determined by the head of each agency or instrumentality of the United States.

* * * * *

[FR Doc. 2013–17662 Filed 7–23–13; 8:45 am]

BILLING CODE 6325–48–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0627; Directorate Identifier 2012–NM–021–AD]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to all BAE Systems (Operations) Limited Model BAe 146 series airplanes and Model Avro 146–RJ series airplanes. The existing AD currently requires revising the maintenance program by incorporating certain airworthiness limitations that require new life limits on certain main landing gear (MLG) components. Since we issued that AD, we have determined that reduced safe life limits on certain nose landing gear (NLG) fittings are necessary. Analysis of these fittings showed the presence of forging indications in the flash line, which might reduce the life limits of these fittings.

This proposed AD would require revising the maintenance program to

incorporate certain limitations. We are proposing this AD to prevent fatigue cracking of certain structural elements, which could adversely affect the structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by September 9, 2013.

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

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

For BAE Systems service information identified in this proposed AD, contact BAE Systems (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; telephone +44 1292 675207; fax +44 1292 675704; email *RApublications@baesystems.com;* Internet *http://www.baesystems.com/Businesses/RegionalAircraft/index.htm.* For Messier-Dowty service information identified in this proposed AD, contact Messier-Dowty: Messier Services Americas, Customer Support Center, 45360 Severn Way, Sterling, Virginia 20166–8910; telephone 703–450–8233; fax 703–404–1621; Internet *https://techpubs.services/messier-dowty.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1175; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0627; Directorate Identifier 2012–NM–021–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

On November 8, 2011, we issued AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011), which superseded AD 2010–10–22, Amendment 39–16301 (75 FR 28463, May 21, 2010). AD 2011–24–06 required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011), we have determined that reduced safe life limits on certain NLG fittings are necessary. Analysis of these fittings showed the presence of forging indications in the flash line, which might reduce the life limits of these fittings. In addition, the aircraft maintenance manual has been revised to redefine the operating time of the aileron and elevator dampers. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2012–0004, dated January 12, 2012 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> * * * Compliance with [certain chapters of the BAe 146/AVRO 146–RJ Aircraft Maintenance Manual (AMM)] has been identified as a mandatory action for continued airworthiness and EASA AD 2011–0048 was issued to require operators to comply with those instructions.
>
> * * * * *
>
> Failure to comply with these instructions could result in an unsafe condition.
>
> For the reasons described above, this EASA AD retains the requirements of EASA AD 2011–0048 [which corresponds to FAA AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011)], which is superseded, and requires the implementation of the new or more restrictive maintenance requirements and/or airworthiness limitations as specified in * * * [certain] sub-chapters of Chapter 05 of the AMM at Revision 105 * * *.

The unsafe condition is fatigue cracking of certain structural elements, which could adversely affect the structural integrity of the airplane. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

BAE Systems (Operations) Limited has issued the following service information. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

- Subject 05–10–15, ''Aircraft Equipment Airworthiness Limitations,'' of Chapter 05, ''Time Limits/Maintenance Checks,'' of BAe 146 Series/AVRO 146–RJ Series Aircraft Maintenance Manual, Revision 105, dated July 15, 2011.
- Subject 05–20–02, ''Airframe Scheduled Maintenance—Landing/Calendar Life Extended,'' of Chapter 05, ''Time Limits/Maintenance Checks,'' of BAe 146 Series/AVRO 146–RJ Series Aircraft Maintenance Manual, Revision 105, dated July 15, 2011.
- Subject 05–20–05, ''Airframe Scheduled Maintenance—Life Extension Programme Landings Life Extended,'' of Chapter 05, ''Time Limits/Maintenance Checks,'' of BAe 146 Series/AVRO 146–RJ Series Aircraft Maintenance Manual, Revision 105, dated July 15, 2011.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

This AD requires revisions to certain operator maintenance documents to include new actions (e.g., inspections) and/or Critical Design Configuration

Control Limitations (CDCCLs). Compliance with these actions and/or CDCCLs is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this AD, the operator may not be able to accomplish the actions described in the revisions. In this situation to comply with 14 CFR 91.403(c), the operator must request approval of an alternative method of compliance (AMOC) according to paragraph (n) of this AD. The request should include a description of changes to the required actions that will ensure the continued operational safety of the airplane.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 2 products of U.S. registry.

The actions that are required by AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011), and retained in this proposed AD take about 2 work-hours per product, at an average labor rate of $85 per work hour. Required parts cost about $0 per product. Based on these figures, the estimated cost of the currently required actions is $170 per product.

We estimate that it would take about 1 work-hour per product to comply with the new basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be up to $170, or $85 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 proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011), and adding the following new AD:

BAE Systems (Operations) Limited: Docket No. FAA–2013–0627; Directorate Identifier 2012–NM–021–AD.

(a) Comments Due Date

We must receive comments by September 9, 2013.

(b) Affected ADs

This AD supersedes AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011).

(c) Applicability

This AD applies to all BAE Systems (Operations) Limited Model BAe 146–100A, –200A, and –300A airplanes; and Model Avro 146–RJ70A, 146–RJ85A, and 146–RJ100A airplanes; certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 05.

(e) Reason

This AD was prompted by a determination that reduced safe life limits on certain NLG fittings are necessary. We are issuing this AD to prevent fatigue cracking of certain structural elements, which could adversely affect the structural integrity 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) Retained Airworthiness Limitations Revisions

(1) This paragraph restates the requirements of paragraph (g) of AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011). Within 90 days after June 25, 2010 (the effective date of AD 2010–10–22, Amendment 39–16301 (75 FR 28463, May 21, 2010)), revise the maintenance program, by incorporating Chapter 5 of the BAE Systems (Operations) Limited BAe146 Series/Avro 146–RJ Series Aircraft Maintenance Manual (AMM) to incorporate new and more restrictive life limits for certain items and new and more restrictive inspections to detect fatigue cracking in certain structures, and to add fuel system (CDCCLs to prevent ignition sources in the fuel tanks, in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA) (or its delegated agent).

(2) This paragraph restates the provisions of Note 2 of AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011). Guidance on revising Chapter 5 of the BAE Systems (Operations) Limited BAe146 Series/Avro 146–RJ Series AMM, Revision 97, dated July 15, 2009, can be found in the applicable sub-chapters listed in Table 1 to paragraph (g)(2) of this AD.

TABLE 1 TO PARAGRAPH (G)(2) OF THIS AD—APPLICABLE AMM SUB-CHAPTERS

AMM Sub-chapter	Subject
05–10–01	Airframe Airworthiness Limitations before Life Extension Programme.
05–10–05 [1]	Airframe Airworthiness Limitations, Life Extension Programme Landings Life Extended.

TABLE 1 TO PARAGRAPH (G)(2) OF THIS AD—APPLICABLE AMM SUB-CHAPTERS—Continued

AMM Sub-chapter	Subject
05–10–10 [2]	Airframe Airworthiness Limitations, Life Extension Programme Calendar Life Extended.
05–10–15	Aircraft Equipment—Airworthiness Limitations.
05–10–17	Power Plant Airworthiness Limitations.
05–15–00	Critical Design Configuration Control Limitations (CDCCL)—Fuel System Description and Operation.
05–20–00 [3]	Scheduled Maintenance.
05–20–01	Airframe Scheduled Maintenance—Before Life Extension Programme.
05–20–05 [1]	Airframe Scheduled Maintenance—Life Extension Programme Landings Life Extended.
05–20–10 [2]	Airframe Scheduled Maintenance—Life Extension Programme Calendar Life Extended.
05–20–15	Aircraft Equipment Scheduled Maintenance.

[1] Applicable only to airplanes post-modification HCM20011A or HCM20012A or HCM20013A.
[2] Applicable only to airplanes post-modification HCM20010A.
[3] Paragraphs 5 and 6 only, on the Corrosion Prevention and Control Program (CPCP) and the Supplemental Structural Inspection Document (SSID).

(3) This paragraph restates the provisions of Note 3 of AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011). Sub-chapter 05–15–00 of the BAE Systems (Operations) Limited BAe146 Series/Avro 146–RJ Series AMM, is the CDCCL.

(4) This paragraph restates the provisions of Note 4 of AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011). Within Sub-chapter 05–20–00 of the BAE Systems (Operations) Limited BAe146 Series/ Avro 146–RJ Series AMM, the relevant issues of the support documents are as follows: BAE Systems (Operations) Limited BAe 146 Series/Avro 146–RJ Corrosion Prevention and Control Program Document CPCP–146–01, Revision 3, dated July 15, 2008, including BAE Systems (Operations) Limited Temporary Revision (TR) 2.1, dated December 2008; and BAE Systems (Operations) Limited BAe146 Series Supplemental Structural Inspection Document SSID–146–01, Revision 1, dated June 15, 2009.

(5) This paragraph restates the provisions of Note 5 of AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011). Within Sub-chapter 05–20–01 of the BAE Systems (Operations) Limited BAe146 Series/ Avro146–RJ Series AMM, the relevant issue of BAE Systems (Operations) Limited BAe 146/Avro 146–RJ Maintenance Review Board Report Document MRB 146–01, Issue 2, is Revision 15, dated March 2009 (mis-identified in EASA AD 2009–0215, dated October 7, 2009, as being dated May 2009).

(6) This paragraph restates the provisions of Note 6 of AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011). Notwithstanding any other maintenance or operational requirements, components that have been identified as airworthy or installed on the affected airplanes before revision of Chapter 5 of the AMM, as required by paragraph (g) of this AD, do not need to be reworked in accordance with the CDCCLs. However, once the Airworthiness Limitations Section (ALS) or AMM has been revised, future maintenance actions on these components must be done in accordance with the CDCCLs.

(h) Retained Restriction of Alternative Actions, Intervals, and/or CDCCLs

This paragraph restates the requirements of paragraph (h) of AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011). Except as specified in paragraphs (i) and (j) of this AD and required by paragraph (l) of this AD: After the actions specified in paragraph (g) of this AD have been accomplished, no alternative inspections or inspection intervals may be approved for the structural elements specified in the documents listed in paragraph (g) of this AD unless the actions, intervals, and/or CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (n) of this AD.

(i) Retained Modification

This paragraph restates the provisions of paragraph (i) of AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011). Modifying the main fittings of the main landing gear in accordance with Messier-Dowty Service Bulletin 146–32–171, dated August 11, 2009, extends the safe limit of the main landing gear main fitting from 32,000 landings to 50,000 landings on the main fitting.

(j) Retained Airworthiness Limitations Revisions

This paragraph restates the requirements of paragraph (j) of AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011). Within 90 days after January 3, 2012 (the effective date of AD 2011–24–06), revise the maintenance program, by incorporating Subject 05–10–15, ''Aircraft Equipment Airworthiness Limitations'' of Chapter 05, ''Time Limits/Maintenance Checks,'' of the BAE Systems (Operations) Limited BAe 146 Series/Avro 146–RJ Series AMM, Revision 104, dated April 15, 2011, to remove life limits on shock absorber assemblies, but not on the individual shock absorber components, amend life limits on MLG up-locks and door up-locks, and to introduce and amend life limits on MLG components. Incorporating the new life limits and inspections into the maintenance program terminates the requirements of paragraph (g) of this AD for Subject 05–10–15, ''Aircraft Equipment Airworthiness Limitations'' of Chapter 05, ''Time Limits/Maintenance Checks,'' of the BAE Systems (Operations) Limited BAe 146 Series/Avro 146–RJ Series AMM, Revision 104, dated April 15, 2011, and after incorporation has been done, the limitations required by paragraph (g) of this AD for Subject 05–10–15, ''Aircraft Equipment Airworthiness Limitations'' of Chapter 05, ''Time Limits/Maintenance Checks,'' of the BAE Systems (Operations) Limited BAe 146 Series/Avro 146–RJ Series AMM, Revision 104, dated April 15, 2011, may be removed from the maintenance program.

(k) Retained Restriction of Alternative Actions, Intervals, and/or CDCCLs

This paragraph restates the requirements of paragraph (k) of AD 2011–24–06, Amendment 39–16870 (76 FR 73477, November 29, 2011). Except as required by paragraph (l) of this AD, after accomplishing the revision required by paragraph (j) of this AD, no alternative actions (e.g., inspections), intervals, and/or CDCCLs may be used, unless the actions, intervals, and/or CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (n) of this AD.

(l) New Airworthiness Limitation Revision

Within 90 days after the effective date of this AD, revise the maintenance program, by incorporating Chapter 05, ''Time Limits/ Maintenance Checks,'' of the BAE Systems (Operations) Limited BAe 146 Series/Avro 146–RJ Series AMM, Revision 105, dated July 15, 2011, into the maintenance program. The initial compliance time for the replacement of any part having a new or revised life limit is at the applicable time specified in Chapter 05, ''Time Limits/Maintenance Checks,'' of the BAE Systems (Operations) Limited BAe 146 Series/Avro 146–RJ Series AMM, Revision 105, dated July 15, 2011, or within 90 days after the effective date of this AD, whichever occurs later.

(1) Within Sub-chapter 05–20–00 of the BAE Systems (Operations) Limited BAe146 Series/Avro 146–RJ Series AMM, supporting documents are BAE Systems (Operations) Limited CPCP Document CPCP–146–01, Revision 4, dated September 15, 2010; and BAE Systems (Operations) Limited Supplemental Structural Inspection Document (SSID) Document SSID–146–01/ 02/03, dated July 12, 2006.

(2) Within Sub-chapter 05–20–01 of the BAE Systems (Operations) Limited BAe146 Series/Avro146–RJ Series AMM, the supporting document is BAE Systems (Operations) Limited Maintenance Review

Board Report (MRBR) Document MRB 146–01, Issue 2, Revision 17, dated March 2011.

(m) No Alternative Actions, Intervals, and/or CDCCLs

After accomplishing the revision required by paragraph (l) of this AD, no alternative actions (e.g., inspections), intervals, and/or CDCCLs may be used, unless the actions, intervals, and/or CDCCLs are approved as an AMOC in accordance with the procedures specified in paragraph (n) of this AD.

(n) Other FAA AD Provisions

The following provisions also apply to this AD: (1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, 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: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1175; 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.

(o) Related Information

(1) Refer to mandatory continuing airworthiness information EASA Airworthiness Directive 2012–0004, dated January 12, 2012; and Chapter 05, ''Time Limits/Maintenance Checks,'' of the BAE Systems (Operations) Limited BAe 146 Series/Avro 146–RJ Series AMM, Revision 105, dated July 15, 2011; for related information.

(2) For BAE Systems service information identified in this AD, contact BAE Systems (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; telephone +44 1292 675207; fax +44 1292 675704; email *RApublications@baesystems.com;* Internet *http://www.baesystems.com/Businesses/RegionalAircraft/index.htm*. For Messier-Dowty service information identified in this proposed AD, contact Messier-Dowty: Messier Services Americas, Customer Support Center, 45360 Severn Way, Sterling, Virginia 20166–8910; telephone 703–450–8233; fax 703–404–1621; Internet *https://techpubs.services/messier-dowty.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on July 12, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–17764 Filed 7–23–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0626; Directorate Identifier 2012–NM–180–AD]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all DASSAULT AVIATION Model FAN JET FALCON; Model MYSTERE–FALCON 200 airplanes; and Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes. This proposed AD was prompted by reports of defective fire extinguisher bottle cartridges. This proposed AD would require checking manufacturing references of pyrotechnical cartridges for batch number and date, repetitive checking of cartridges for electrical continuity, and replacing defective pyrotechnical cartridges if necessary. We are proposing this AD to detect and correct defective fire bottle cartridges, which could affect the capability to extinguish a fire in an engine, auxiliary power unit, or rear compartment, which could result in damage to the airplane and injury to the occupants.

DATES: We must receive comments on this proposed AD by September 9, 2013.

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

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

For service information identified in this proposed AD, contact Dassault Falcon Jet, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; Internet *http://www.dassaultfalcon.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

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

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0626; Directorate Identifier 2012–NM–180–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the aviation authority for the Member States of the European Community, has issued EASA

Airworthiness Directive 2012–0190, dated September 24, 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:

Several defective fire bottle cartridges have been reported on certain Dassault Aviation Fan Jet Falcon and Mystère-Falcon 20-() 5 aeroplanes.

The results of the investigations concluded that there was a production quality issue with the fire bottle cartridge. In addition, the part numbers (P/N) of the fire bottle cartridge and the batch numbers have been identified.

This condition, if not detected and corrected, could constitute a dormant failure that might impact the capability to extinguish a fire, either in an engine or the Auxiliary Power Unit, or the rear compartment, possibly resulting in damage to the aeroplane and injury to the occupants.

For the reason described above, this [EASA] AD requires repetitive checking of the electrical continuity [and of the references] of the fire extinguishers bottles cartridges [extinguisher bottle cartridges] and depending on findings, replacement of an affected part with a serviceable part. It also ultimately requires replacement of any affected cartridges with a serviceable part. In addition, this [EASA] AD prohibits installation of an affected fire extinguisher bottle cartridge.

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

Relevant Service Information

Dassault has issued Mandatory Service Bulletin F20–783, Revision 1, dated June 11, 2012 (for Model FAN JET FALCON and MYSTERE–FALCON 20-()5 airplanes); and Mandatory Service Bulletin F200–128, Revision 1, dated June 11, 2012 (for Model MYSTERE–FALCON 200 airplanes). The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 185 products of U.S. registry. We also estimate that it would take about 5 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $6,300 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 the proposed AD on U.S. operators to be $1,244,125, or $6,725 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 proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Dassault Aviation: Docket No. FAA–2013–0626; Directorate Identifier 2012–NM–180–AD.

(a) Comments Due Date

We must receive comments by September 9, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the DASSAULT AVIATION airplanes identified in paragraphs (c)(1) through (c)(3) of this AD, certificated in any category, all serial numbers.

(1) Model FAN JET FALCON airplanes,

(2) Model MYSTERE–FALCON 200 airplanes,

(3) Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 26, Fire Protection.

(e) Reason

This AD was prompted by reports of defective fire bottle cartridges. We are issuing this AD to detect and correct defective fire bottle cartridges which could impact the capability to extinguish a fire, either in an engine, auxiliary power unit, or rear compartment, which could result in damage to the airplane and injury to the occupants.

(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) Checks of References of Cartridges

For airplanes equipped with fire extinguisher bottle cartridges having a part number (P/N), batch number, and manufacturing date as listed in paragraph (g)(1), (g)(2), or (g)(3) of this AD: Within 30 days or 100 flight hours, whichever occurs first after the effective date of this AD, check the manufacturing references of pyrotechnical cartridges for batch number and date, and check the cartridges for electrical continuity and resistance, in accordance with the Accomplishment Instructions of Dassault Mandatory Service Bulletin F20–783, Revision 1, dated June 11, 2012 (for Model FAN JET FALCON and MYSTERE–FALCON 20-()5 airplanes); or Dassault Mandatory Service Bulletin F200–128, Revision 1, dated June 11, 2012 (for Model MYSTERE–FALCON 200 airplanes).

(1) P/N 12–12–11707S1–4, with batch up to 44 inclusive, manufactured before May 2012.

(2) P/N 12–12–11707S2–4, with batch up to 33 inclusive, manufactured before May 2012.

(3) P/N 12–12–11707S3–4, with batch up to 44 inclusive, manufactured before May 2012.

(h) Replacement

If, during any check as required by paragraphs (g) and (i) of this AD, a discrepancy [excessive resistance or cartridges references matching (g)(1) through (g)(3)] is identified, before next flight, replace the discrepant fire extinguisher bottle cartridge(s) with a serviceable part, in accordance with the Accomplishment Instructions of Dassault Mandatory Service Bulletin F20–783, Revision 1, dated June 11, 2012 (for Model FAN JET FALCON and MYSTERE–FALCON 20-()5 airplanes); or Dassault Mandatory Service Bulletin F200–128, Revision 1, dated June 11, 2012 (for Model MYSTERE–FALCON 200 airplanes). Replacement of discrepant fire extinguisher bottle cartridges with a serviceable part terminates the repetitive actions required by paragraph (i) of this AD for that cartridge.

(i) Repetitive Checks

At the applicable time specified in paragraph (i)(1) and (i)(2) of this AD, repeat the checks required by paragraph (g) of this AD.

(1) For airplanes equipped with fire extinguisher bottle cartridges having P/N 12–12–11707S3–4, having a batch number, and manufacturing date, as listed in paragraph (g)(3) of this AD, at intervals not to exceed 65 days.

(2) For airplanes equipped with fire extinguisher bottle cartridges having P/N 12–12–11707S1–4 or P/N 12–12–11707S2–4, having a batch number, and manufacturing date, as listed in paragraph (g)(1) or (g)(2) of this AD, at intervals not to exceed 12 months.

(j) Replacement

Except as required by paragraph (h) of this AD: Within 30 months after installation of an affected fire extinguisher bottle cartridge on an airplane, or within 36 months since cartridge manufacturing date, whichever occurs first after the effective date of this AD, replace each affected fire extinguisher bottle cartridge listed in paragraphs (g)(1), (g)(2), and (g)(3) of this AD, with a serviceable part, in accordance with the Accomplishment Instructions of Dassault Mandatory Service Bulletin F20–783, Revision 1, dated June 11, 2012 (for Model FAN JET FALCON and MYSTERE–FALCON 20-()5 airplanes); or Dassault Mandatory Service Bulletin F200–128, Revision 1, dated June 11, 2012 (for Model MYSTERE–FALCON 200 airplanes). Replacing the affected fire extinguisher bottle cartridge with a serviceable part as required by paragraph (h) or (j) of this AD, terminates the repetitive actions required by paragraph (i) of this AD for that cartridge.

(k) Parts Installation Prohibition

As of the effective date of this AD, no person may install any fire extinguisher bottle cartridge having a part number (P/N), batch number, and manufacturing date as listed in paragraph (g)(1), (g)(2), or (g)(3) of this AD, on any airplane.

(l) 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.

(m) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) European Aviation Safety Agency (EASA) Airworthiness Directive 2012–0190, dated September 24, 2012; and the service bulletins specified in (m)(1)(i) and (m)(1)(ii) of this AD, for related information.

(i) Dassault Mandatory Service Bulletin F20–783, Revision 1, dated June 11, 2012 (for Model FAN JET FALCON and MYSTERE–FALCON 20-()5 airplanes);

(ii) Dassault Mandatory Service Bulletin F200–128, Revision 1, dated June 11, 2012 (for Model MYSTERE–FALCON 200 airplanes).

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

Issued in Renton, Washington, on July 12, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–17765 Filed 7–23–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket No. RM13–7–000]

Protection System Maintenance Reliability Standard

AGENCY: Federal Energy Regulatory Commission, Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: Pursuant to section 215 of the Federal Power Act, the Commission proposes to approve a revised Reliability Standard, PRC–005–2—Protection System Maintenance, to supersede four existing Reliability Standards, PRC–005–1.1b (Transmission and Generation Protection System Maintenance and Testing), PRC–008–0 (Underfrequency Load Shedding Equipment Maintenance), PRC–011–0 (Undervoltage Load Shedding Equipment Maintenance) and PRC–017–0 (Special Protection System Maintenance and Testing). In addition, the Commission seeks clarification and comment on three aspects of the proposed Reliability Standard and proposes to modify one violation severity level.

DATES: Comments are due September 23, 2013.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways:

- Electronic Filing through *http://www.ferc.gov.* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.

Those unable to file electronically may mail or hand-deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures Section of this document.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

144 FERC ¶ 61,055

(July 18, 2013)

1. Pursuant to section 215 of the Federal Power Act (FPA),[1] the Commission proposes to approve a revised Reliability Standard, PRC–005–2—Protection System Maintenance, to supersede four existing Reliability Standards, PRC–005–1.1b (Transmission and Generation Protection System Maintenance and Testing), PRC–008–0 (Underfrequency Load Shedding Equipment Maintenance), PRC–011–0 (Undervoltage Load Shedding Equipment Maintenance) and PRC–017–0 (Special Protection System Maintenance and Testing). The proposed modifications, in part, respond to certain Commission directives issued in Order No. 693,[2] in which the Commission approved initial versions of these four Reliability Standards governing maintenance and testing of protection systems, and maintenance of underfrequency and undervoltage load shedding equipment.

2. Proposed Reliability Standard PRC–005–2 represents an improvement over the four existing standards covering protection system maintenance and testing, by incorporating specific, required minimum maintenance activities and maximum time intervals for maintenance of individual components of protection systems and load shedding equipment affecting the bulk electric system. While the proposed Reliability Standard also gives responsible entities the option of developing their own, performance-based maintenance intervals for most components, the intervals must be designed to achieve a minimum performance level, and must be adjusted if that target performance level is not actually achieved. In addition, the proposed Reliability Standard combines the maintenance and testing requirements for protection systems into one comprehensive Reliability Standard, as was suggested by the Commission in Order No. 693.[3]

3. While the proposed Reliability Standard contains overall improvements, as discussed below, we seek additional information and comments on the following: (A) Verification of operability and settings upon placement in-service of new or modified protection systems; (B) use of a four percent target for countable events in performance-based programs; and (C) violation severity levels for certain Requirement R1 violations.

4. We also propose to approve the six new definitions associated with proposed Reliability Standard PRC–005–2, i.e., Component, Component Type, Countable Event, Protection System Maintenance Program, Segment, and Unresolved Maintenance Issue. Of these newly defined terms, NERC proposes to include only the term Protection System Maintenance Program in its Glossary of Terms, with the remainder applying only to Reliability Standard PRC–005–2.

5. Finally, we propose to approve NERC's proposed implementation plan for the proposed Reliability Standard, which requires entities to develop a compliant protection system maintenance program within twelve months, but allows for the transition over time of maintenance activities and documentation to conform to the new minimum maintenance activities and maximum maintenance intervals.

I. Background

A. Regulatory Background

6. Section 215 of the FPA requires a Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, subject to Commission review and approval.[4] Once approved, the Reliability Standards may be enforced by the ERO subject to Commission oversight, or by the Commission independently.[5]

7. In 2006, the Commission certified NERC as the ERO pursuant to FPA section 215.[6] In 2007, in Order No. 693, the Commission approved an initial set of Reliability Standards submitted by NERC, including initial versions of four protection system and load-shedding-related maintenance standards, *i.e.,* PRC–005–1, PRC–008–0, PRC–011–0, and PRC–017–0.[7]

8. In approving these protection system-related Reliability Standards, the Commission directed NERC to develop or to consider a number of modifications. Specifically, the Commission directed NERC to: (1) Develop a revision to PRC–005–1 incorporating a maximum time interval during which to conduct maintenance and testing of protection systems; and (2) consider combining into one standard the various maintenance and testing requirements for all of the maintenance and testing-related Reliability Standards for protection systems, underfrequency load shedding (UFLS) equipment and undervoltage load shedding (UVLS) equipment.[8]

9. In a subsequent order, issued in response to NERC's request for approval of its interpretation of PRC–005–1 (Order No. 758), the Commission issued three additional directives, addressing deficiencies in the existing version of Reliability Standard PRC–005.[9] The Commission directed NERC to modify Reliability Standard PRC–005–1, through its standards development process, to: (1) Identify and include the auxiliary relays and non-electrical sensing devices designed to sense or take action against any abnormal system condition that will affect reliable operation (such as sudden pressure relays); (2) include specific requirements for maintenance and testing of reclosing relays that affect the reliable operation of the bulk-power system; and (3) include specific requirements for maintenance and testing of DC control circuitry.

B. Existing Protection System-Related Maintenance Standards

10. Under currently-effective Reliability Standard PRC–005–1b, transmission owners, generator owners, and applicable distribution providers are required to have a protection system maintenance and testing program for any protection system elements that affect the bulk electric system, and must

[1] 16 U.S.C. 824o (2006).

[2] *Mandatory Reliability Standards for the Bulk Power System,* Order No. 693, 72 FR 16,416 (April 4, 2007), FERC Stats. & Regs. ¶ 31,242 (2007), *order on reh'g,* Order No. 693–A, 120 FERC ¶ 61,053 (2007).

[3] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1475.

[4] *Id.* at 824o(c) and (d).

[5] *See id.* at 824o(e).

[6] *North American Electric Reliability Corp.,* 116 FERC ¶ 61,062, *order on reh'g & compliance,* 117 FERC ¶ 61,126 (2006), *aff'd sub nom. Alcoa, Inc.* v. *FERC,* 564 F.3d 1342 (D.C. Cir. 2009).

[7] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at PP 1474, 1492, 1497, and 1514.

[8] In Order No. 763, the Commission approved Reliability Standard PRC–006–1 pertaining to ''underfrequency load shedding'' which also encompasses ''undervoltage load shedding.'' *Automatic Underfrequency Load Shedding and Load Shedding Plans Reliability Standards,* Order No. 763, 139 FERC ¶ 61,098 (2012).

[9] *Interpretation of Protection System Reliability Standard,* 138 FERC ¶ 61,094 (2012) (Order No. 758).

document their compliance with that program. The program must include maintenance and testing intervals and their basis, and a summary of maintenance and testing procedures. However, Reliability Standard PRC–005–1b does not impose any specific requirements regarding maintenance activities, standards or intervals. Similarly, Reliability Standards PRC–008–0, PRC–011–0, and PRC–017–0 require applicable transmission owners, distribution providers and generator owners to have a maintenance and testing program in place for UFLS equipment, UVLS equipment, and special protection systems, respectively, and to document their compliance with their program. These Reliability Standards, like PRC–005–1b, do not impose any specific requirements regarding maintenance activities, standards or intervals.

C. NERC Petition and Proposed Standard PRC–005–2

11. On February 26, 2013, NERC submitted a petition seeking approval of proposed Reliability Standard PRC–005–2, six new definitions associated with that standard, and a proposed implementation plan that includes retirement of the four currently-effective Reliability Standards that address maintenance and testing of transmission and generation protection systems, UFLS and UVLS equipment, and special protection systems. NERC maintains that the proposed Reliability Standard not only consolidates the four currently-effective standards into a single standard, but also addresses the directives in Order No. 693 related to those standards.[10]

12. NERC states that the proposed Reliability Standard establishes minimum acceptable maintenance activities and accompanying maximum allowable maintenance intervals for specific component types, gives responsible entities flexibility to implement ''condition-based maintenance'' that allows for adjustment of intervals and activities to reflect monitoring of components, and establishes requirements for the implementation of performance-based maintenance programs.[11] NERC maintains that the proposed standard will improve reliability by:

(i) defining and establishing criteria for a Protection System Maintenance Program; (ii) reducing the risk of Protection System Misoperations; (iii) clearly stating the applicability of the Requirements in proposed PRC–005–2 to certain Functional Entities and Facilities; (iv) establishing Requirements for time-based maintenance programs that include maximum allowable maintenance intervals for all relevant devices; and (v) establishing Requirements for condition-based and performance-based maintenance programs where hands-on maintenance intervals are adjusted to reflect the known and reported condition or the historical performance, respectively, of the relevant devices.[12]

13. NERC asserts that the proposed Reliability Standard not only represents a comprehensive approach to documenting and implementing programs for maintenance of all protection systems affecting the reliability of the bulk electric system, but also reduces the risk of misoperations ''by applying consistent, best practice maintenance and inspection activities of Protection System Components.'' [13] NERC maintains that the proposed Reliability Standard represents an improvement over the four standards that would be superseded, because none of the existing standards contain technical requirements for any of the maintenance programs, but merely specify that a program be in place and that each responsible entity comply with the requirements of its own program.[14]

14. NERC also maintains that the proposed Reliability Standard satisfies three outstanding directives from Order No. 693 related to the PRC maintenance standards. First, NERC explains that the proposed Reliability Standard includes maximum allowable intervals for maintenance of protection system components (as set out in Tables 1–1 through 1–5, Table 2 and Table 3 of Reliability Standard PRC–005–2).[15] Second, Reliability Standard PRC–005–2 combines the requirements for PRC–005, PRC–008, PRC–011 and PRC–017 into one new, revised standard, addressing maintenance for transmission and generation protection systems, for special protection systems, and for UFLS and UVLS equipment.[16] Finally, in Order No. 693, the Commission directed NERC to consider whether load serving entities and transmission operators should be included in the applicability of PRC–004.[17] NERC maintains that it considered whether load-serving entities and transmission operators should be subject to any of the PRC maintenance and testing requirements, but determined that the applicable maintenance requirements need only apply to equipment owners such as generation owners, transmission owners, and certain distribution providers.[18] NERC explains that ''[w]hile an equipment owner may need to coordinate with the operating entities in order to schedule the actual maintenance, the responsibility resides with the equipment owners to complete the required maintenance.'' [19]

15. The proposed Reliability Standard includes five requirements. Under Requirement R1, each responsible entity must establish a protection system maintenance program that: (1) Identifies which method (time-based or performance-based) will be used for each protection system component type, except that the maintenance program for all batteries associated with the station DC supply of a protection system must be time-based; and (2) identifies monitored component attributes for each component type where monitoring is used as a basis for extending maintenance intervals.

16. Under Requirement R2, any responsible entity that uses performance-based maintenance intervals must follow the procedures set out in Attachment A of the proposed Reliability Standard to set and to adjust, as necessary, appropriate maintenance intervals. The Attachment A procedures allow a responsible entity to establish maintenance intervals for a given population of similar components based on historical performance, as long as there is a statistically significant population of components for which performance can be examined and monitored. For example, under the Attachment A procedures, a responsible entity can only use a performance-based interval for ''segments'' with a component population of at least 60 components.[20] The maximum allowable

[10] NERC Petition at 2. *See also* NERC Petition at 12 where NERC states that while additional directives related to the PRC–005 Reliability Standard were issued by the Commission in a subsequent order, Order No. 758, these directives are being addressed in future projects related to PRC–005. NERC indicates in its petition that it will address these remaining directives in future versions of PRC–005, and that it is currently addressing the maintenance and testing of reclosing relays in a new Project [2007–17]. *See* NERC Petition at 7–8 (citing NERC's Informational Filing in Compliance with Order No. 758, Docket No. RM10–5, and NERC Project 2007–17 Protection System Maintenance—Phase 2 (Reclosing Relays)).

[11] *Id.* at 3.

[12] *Id.*

[13] *Id.* at 11.

[14] *Id.*

[15] *Id.* at 12.

[16] *Id.* at 12–13.

[17] Order No. 693, FERC Stats & Regs. ¶ 31,242 at P 1469.

[18] NERC Petition at 13.

[19] *Id.*

[20] NERC defines ''segment'' as ''Protection Systems or components of a consistent design standard, or a particular model or type from a single manufacturer that typically share other common elements. Consistent performance is expected across the entire population of a Segment.'' NERC Petition, Ex. B (PRC–005–2) at 26.

maintenance interval for a given segment is required to be set such that the segment will experience countable events of no more than four percent of the components within that segment, for the greater of either the last 30 components maintained or all components maintained in the previous year.[21]

17. In addition, to continue to utilize a performance-based interval, the responsible entity must update its list of components and segments annually (or whenever a change occurs within a segment), must maintain a minimum number or percentage of components a year, and must analyze a given segment's maintenance record to determine the percentage of countable events. If the percentage of countable events for the last 30 components maintained or the number of components maintained over the last year (whichever is larger) exceeds four percent, the responsible entity must implement an action plan to reduce the expected countable events to less than four percent for that segment within the next three years.

18. Requirements R3 and R4 require a responsible entity to adhere to the requirements of its protection system maintenance program, including performance of minimum maintenance activities. Under Requirement R3, which governs time-based maintenance, the activities must be performed in accordance with the intervals prescribed in the tables attached to PRC–005–2. Under Requirement R4, the activities must be carried out in accordance with the performance-based intervals established under Requirement R2 and Attachment A.

19. Under Requirement R5, responsible entities must ''demonstrate efforts to correct identified Unresolved Maintenance Issues,'' which are defined as ''deficienc[ies] identified during a maintenance activity that causes the component to not meet the intended performance, cannot be corrected during the maintenance interval, and requires follow-up corrective action.'' NERC explains that the intent of Requirement R5 is ''to assure that Protection System components are returned to working order following the discovery of failures or malfunctions during scheduled maintenance.'' [22]

20. With respect to implementation, NERC proposes to require entities to fully comply with Requirements R1, R2 and R5 within 12 months of regulatory approval (or 24 months from the date of NERC Board approval where no regulatory approval is required).[23] Accordingly, applicable entities must develop their revised protection system maintenance program within one year.[24] NERC's proposed implementation plan would allow a more lengthy implementation period with respect to achieving full compliance with the newly-prescribed maintenance activities and documentation, permitting a transition of maintenance activities and documentation over time, with the compliance period scaled to the length of the applicable maximum maintenance interval.[25] Thus, for component types with the shortest allowable maintenance interval (i.e*.,* less than one year, or between one and two years), entities would be required to fully comply with the new requirements within 18 months of regulatory approval, and 36 months of regulatory approval, respectively.[26] For components types with longer maintenance intervals (3, 6 and 12 years), NERC proposes to require compliance over the applicable maintenance interval in equally distributed steps. For component types with the longest maximum allowable maintenance interval (i.e*.,* 12 years), entities must be 30 percent compliant within 5 years, 60 percent compliant within 9 years, and fully compliant within 13 years after regulatory approval.[27]

21. NERC explains that this implementation program takes into consideration that certain entities may not currently be performing all required maintenance activities specified in proposed PRC–005–2, and may not have all the documentation necessary to demonstrate compliance.[28] NERC further states that ''it is unrealistic for those entities to be immediately compliant with the new activities or intervals,'' and that ''entities should be allowed to become compliant in such a way as to facilitate a continuing maintenance program.'' [29] Finally, NERC explains that it developed this step-wise implementation plan ''in order that entities may implement this standard in a systematic method that facilitates an effective ongoing Protection System Maintenance Program.'' [30]

II. Discussion

22. Pursuant to section 215(d)(2) of the FPA, the Commission proposes to approve Reliability Standard PRC–005–2, the six associated definitions referenced in the proposed standard, and NERC's proposed implementation plan. The proposed Reliability Standard appears to adequately address the Commission directives from Order No. 693 with respect to: (1) Including maximum allowable intervals in PRC–005; (2) combining PRC–005, PRC–008, PRC–011, and PRC–017; and (3) considering whether load serving entities and transmission operators should be included in the applicability of the PRC–005 Reliability Standard. Proposed Reliability Standard PRC–005–2 should also improve reliability by reducing the risk of protection system misoperations and establishing requirements for condition-based and performance-based maintenance programs where hands-on maintenance intervals are adjusted to reflect the known and reported condition or the historical performance of the relevant devices.

23. However, we believe that further clarification is warranted with respect to certain aspects of proposed PRC–005–2, including NERC's proposed approach to enforcement of its requirements. Additional information is also needed to fully evaluate NERC's proposed targets for the establishment of performance-based maintenance intervals. As discussed below, we seek additional information and comments on the following: (A) Verification of operability and settings upon placement in-service of new or modified protection systems; (B) use of a four percent target for countable events in performance-based programs; and (C) violation severity levels for certain Requirement R1 violations.

A. Verification of Operability and Settings Upon Placement In-Service

24. As proposed, Reliability Standard PRC–005–2 does not include separate requirements for protection system commissioning testing for new or modified equipment (i.e., testing activities necessary to ensure that new or modified equipment has been built and will function in accordance with its

[21] NERC defines ''countable event'' as ''a failure of a component requiring repair or replacement, any condition discovered during the maintenance activities in Tables 1–1 through 1–5 and Table 3 which requires corrective action, or a Misoperation attributed to hardware failure or calibration failure.'' NERC Petition, Ex. B (PRC–005–2) at 26.

[22] NERC Petition at 18.

[23] NERC Petition, Ex. C (Implementation Plan) at 2, 4.

[24] *See id.* at 2.

[25] *Id.*

[26] *Id.* at 4.

[27] *Id.* at 5. NERC notes, however, that ''[o]nce an entity has designated PRC–005–2 as its maintenance program for specific Protection System components, they cannot revert to the original program for those components.'' *Id.* at 2.

[28] *Id.* at 1.

[29] *Id.*

[30] *Id.* at 2.

design). NERC maintains that such testing is often performed by a different organization (such as a start-up or commissioning group of the organization, or a contractor hired to construct and start-up or commission the facility) than the organization responsible for the on-going maintenance of the protection system, and that the activities required for such testing will not necessarily correlate to the maintenance activities required by the proposed standard.[31]

25. At the same time, NERC acknowledges that ''a thorough commission testing program would include, either directly or indirectly, the verification of all those Protection System attributes addressed by the maintenance activities specified in the Tables of PRC–005–2,'' and that ''an entity would be wise to retain commissioning records to show a maintenance start date.'' [32] In addition, NERC states that ''PRC–005–2 assumes that thorough commission testing was performed prior to a protection system being placed in service.'' [33] Finally, in discussing whether the initial date for setting the time clock for maintenance should be the date of commission testing versus the in-service date, NERC asserts that ''[w]hichever method is chosen, for newly installed Protection Systems the components *should not be placed into service until minimum maintenance activities have taken place.*'' [34]

26. NERC's petition assumes that components will not be placed into service until they have been determined to be within the same range of operability and accuracy as would be required when completing the maintenance and inspection activities delineated in proposed Reliability Standard PRC–005–2. However, the Reliability Standard does not include a requirement to verify that protection system equipment and components operate at least as accurately as required under the PRC–005–2 maintenance standards when those components are first placed in service or are modified. We are concerned that a reliability gap may exist if entities are not required to demonstrate compliance with PRC–005–2 standards when relevant equipment or components are placed in service or modified.[35]

27. We note that the failure to verify the accurate functioning of protection system components when placed in service, or when subsequently modified, has been identified as a direct cause of misoperations in several instances, resulting in violations of the currently-effective PRC–004 standard. For example, Notice of Penalty filings in Docket Nos. NP11–105, NP11–129, and NP13–37 contain Reliability Standard PRC–004 violations where protection systems were placed in service and misoperated.[36] Accordingly, we seek explanation from NERC regarding whether and, if so, how it intends to interpret and enforce Reliability Standard PRC–005–2 to require that newly installed or modified protection system equipment or components perform at the same level as is required for subsequent compliance, including verification of applicable settings as specified whenever a relay is repaired, replaced, or upgraded with a new firmware version.[37]

28. If NERC does not believe that it can interpret and enforce the proposed Reliability Standard to include such a requirement, we seek comment on whether the proposed standard should be modified to address our underlying concern, i.e., verification that newly-commissioned or modified equipment and components meet the same requirements specified for subsequent maintenance and testing in the proposed Reliability Standard.

B. Four Percent Target for Countable Events in Performance-Based Program

29. Pursuant to Requirement R2 of proposed Reliability Standard PRC–005–2, responsible entities may choose to establish performance-based maintenance intervals for individual component types, according to the procedures set out in Attachment A of the standard. According to the Attachment A procedures, the responsible entity must first develop a list of components to be included in the designated segment (with a minimum population of 60 components).[38] Using that analysis and looking at the greater of either the last 30 components maintained or all components maintained within the segment over the last year, the responsible entity must set a maximum allowable interval for each segment so that countable events will occur on no more than four percent of the components within that segment. In addition, the maintenance history of the segment is to be reviewed at least annually to determine the overall performance of the segment, and, if the four percent target is not met, the entity is required to develop and implement an action plan to reduce countable events to less than four percent within three years.[39]

30. Under the proposed standard, an entity would not be in violation of Requirement R2 of the standard upon failing to achieve a 4 percent or less failure rate for a given segment in the first year the failure occurs, but would violate Requirement R2 if: (1) The entity could not show that the interval selected was initially set to expect a failure rate of no more than 4 percent; (2) the entity fails to make immediate

[31] NERC Petition, Ex. E (Supplementary Reference and FAQ) at 35.

[32] *Id.* NERC also notes that an entity ''that requires that their commissioning tests have, at a minimum, the requirements of PRC–005–2 would help that entity prove time interval maximums by setting the initial time clock.'' *Id.*

[33] *Id.*

[34] *Id.* (emphasis added).

[35] For example, Table 1–1 of PRC–005–2 requires entities to ''verify that settings are as specified,'' to ''verify operation of the relay inputs and outputs that are essential to proper functioning of the protection system,'' or to ''verify acceptable measurement of power system input values'' for particular types of protective relays. NERC Petition, Ex. B (Proposed Reliability Standard PRC–005–2) at Table 1–1.

[36] In one instance, the Texas Reliability Entity found that: (1) An entity had incorrectly wired a capacitance coupled voltage transformer used in the protection scheme when it was replaced, resulting in approximately 20 misoperations; and (2) an entity had incorrectly wired and set a protective relay system compounded by contractor or consultant design errors, leading to five misoperations, in violation of its commissioning verification procedures, which called for end-to-end testing of the trip output logic wiring and trip testing, and posing a moderate risk to the reliability of the Bulk-Power System. *See* Notice of Penalty regarding American Electric Power Service Corp., Docket No. NP13–37–000 (filed May 30, 2013). *See also* Notice of Penalty filings in Docket Nos. NP11–105 (incorrect CT wiring configuration led to misoperations) and NP11–129 (failure by a contractor relay technician to remove a shorting screw after testing of relay led to misoperation).

[37] The Commission believes that vendor-issued firmware upgrades for microprocessor relays are common, and verification of settings whenever an upgrade is installed is critical for proper relay performance.

[38] Until such time as the entity has performed and analyzed the required maintenance activities applicable to the segment for at least 30 individual components, it must maintain the segment using PRC–005–2's time-based intervals, as specified in Tables 1–1 to 1–5, 2 and 3, *i.e.,* it cannot adopt a performance-based interval until it has performed and analyzed the maintenance history for a minimum pool of components.

[39] As NERC explains in the Supplementary Reference and FAQ (Ex. E) attached to its petition, entities using a performance-based program must not only ''demonstrate how they analyze findings of performance failures and aberrations'' but must also ''implement continuous improvement actions'' to meet the failure rate targets. *See* NERC Petition, Ex. E at 40. NERC provides examples of the kinds of methods that can be used to correct segment performance, including decreasing the maximum allowable interval, identifying sub-groups of components within the segment that may need more targeted action, and replacement of poorly performing components within a segment. *Id.* at 44. *See also id.* at 47 (providing an example calculation of the development and adjustment of a performance-based interval, showing an immediate adjustment to the maintenance interval, and consequent increase in number of units tested annually, when failure rates exceed 4 percent).

changes to its performance-based maintenance program to achieve a 4 percent target within 3 years; or (3) the entity does not actually achieve a 4 percent failure rate for that segment within 3 years after adjusting its program.[40]

31. In the Technical Justification NERC submitted as part of its petition, NERC explains the basis for selecting a four percent target for countable events as follows:

The 4% number was developed using the following:

General experience of the drafting team based on open discussions of past performance.

Test results provided by Consumers Energy for the years 1998–2008 showing a yearly average of 7.5% out-of-tolerance relay test results and a yearly average of 1.5% defective rate.

Two failure analysis reports from Tennessee Valley Authority (TVA) where TVA identified problematic equipment based on a noticeably higher failure of a certain relay type (failure rate of 2.5%) and voltage transformer type (failure rate of 3.6%).[41]

32. NERC does not provide any further details about the scope and specific results of the referenced studies, or a clear explanation of how the four percent figure was derived from these studies. Moreover, the referenced studies appear to focus on out-of-tolerance rates for electro-mechanical protective relays, and NERC provided little to no support for application of those expected rates to other types of components.[42]

33. While NERC provides some historical support for the use of a four percent target figure for countable events in setting an appropriate performance-based maintenance interval for certain component types (*e.g.,* electro-mechanical protective relays), it is also not clear whether the four percent rate is appropriate for component types known to have higher levels of reliability (particularly microprocessor-based relays, trip coils, and lockout devices). Microprocessor-based relays, for example, rarely go out-of-tolerance due to continuously-running self-diagnostic routines.[43] Thus, these types of relays either operate as installed and set, or, if faulty, indicate an alarm condition that may disable the device. A four percent failure rate for any given segment of microprocessor-based relays could indicate a significant issue with that relay type, warranting further investigation and possible system-wide replacement rather than continuation of routine maintenance.

34. In light of NERC's finding in its State of Reliability Report that protection system misoperations are the leading initiating cause of disturbance events (other than weather and ''unknown''),[44] we seek comment from NERC and other interested parties that provides further information and technical support for whether failure rates should be established for each component type rather than relying upon a blanket rate for all component types. If, in the alternative, a blanket failure rate is to be established, we seek comment on whether the use of a blanket four percent failure rate for all component types is better-suited for setting appropriate performance-based maintenance intervals. This information could inform a determination whether modification of the target rate is appropriate. Alternatively, if the technical information to address our concern is not currently available and cannot be provided in comments, we propose to direct that NERC study and submit a report and recommendations based on the study results concerning the expected failure rates for individual component types.

C. Correcting Unresolved Maintenance Issues (Requirement R5)

35. Under Requirement R5, responsible entities must ''demonstrate efforts to correct identified Unresolved Maintenance Issues.'' An ''unresolved maintenance issue'' is defined as a ''deficiency identified during a maintenance activity that causes the component to not meet the intended performance, cannot be corrected during the maintenance interval, and requires follow-up corrective action.''[45]

36. According to NERC, the reliability objective of Requirement R5 is to ''assure that Protection System components are returned to working order following the discovery of failure or malfunctions during scheduled maintenance,''[46] and restoration of a protection system component to working order is not otherwise explicitly required by the maintenance activities specified in the PRC–005–2 Tables.[47] NERC explains the rationale behind Requirement R5, and the latitude to complete correction or restoration of a discovered problem outside of the normal maintenance interval, as follows:

The drafting team does not believe entities should be found in violation of a maintenance program requirement because of the inability to complete a remediation program within the original maintenance interval. The drafting team does believe corrective actions should be timely but concludes it would be impossible to postulate all possible remediation projects and therefore, impossible to specify bounding time frames for resolution of all possible Unresolved Maintenance Issues or what documentation might be sufficient to provide proof that effective corrective action has been initiated. Therefore Requirement R5 requires only the entity demonstrate efforts to correct the Unresolved Maintenance Issues.[48]

37. We agree that allowing entities additional time beyond the maximum maintenance interval period to complete ''restorative'' action may be warranted in certain circumstances, including when the corrective action involves redesign, ordering additional equipment, or timing corrective work to correspond to planned outages.[49] However, we expect that these instances will be limited and, in most circumstances, entities should have the capability to replace components and make minor repairs within the maximum maintenance interval. Our expectation is consistent with the assumptions NERC used in developing the maximum maintenance intervals for proposed Reliability Standard PRC–005–2, which include an allowance for the ''grace period'' that transmission owners and generation owners often

[40] *See generally, id.* at 40–53.

[41] NERC Petition, Ex. D (Technical Justification) at 5.

[42] An out-of-tolerance condition indicates that the device is not performing within the manufacturer's specified band of tolerance or accuracy, but for electro-mechanical protective relays an out-of-tolerance condition does not imply that the device is not operational.

[43] Schweitzer Engineering Laboratories, Inc. (SEL) indicates in its 2009 white paper ''SEL Recommendations on Periodic Maintenance Testing of Protective Relays'' a measurement of hardware failures of about 0.33% failures per year for microprocessor-based relays.

[44] NERC Report: State of Reliability 2013 at 13 (May 2013).

[45] NERC Petition at 14.

[46] *Id.* 18.

[47] NERC Petition, Ex. D (Technical Justification) at 16 (The maintenance activities specified in the Tables 1–1 through 1–5, Table 2, and Table 3 do not present any requirements related to restoration.'')

[48] *Id.* at 17.

[49] The ''corrective actions'' to be taken by a transmission owner, generator owner, or distribution provider under PRC–005–2 include potentially time-consuming tasks such as physical repair and replacement of faulty equipment in the protection system. Notably, under PRC–001–1, transmission operators and generator operators have a separate obligation to take ''corrective action'' when a protective relay or equipment failure reduces system reliability. ''Corrective action'' under PRC–001–1 refers to operator control actions such as removing the facility without protection from service, generation redispatch, transmission reconfiguration, etc., which actions must be completed as soon as possible and within at least 30 minutes. *See* NERC Reliability Standard PRC–001–1; Order No. 693, FERC Stats. & Regs. ¶ 31,242 at PP 1439–1440.

include in their maintenance programs.[50]

D. Violation Severity Level for R1 Violation—Station Batteries

38. Under the second sentence of Part 1.1 of Requirement R1, all batteries associated with station DC supply must be included in a time-based maintenance program, *i.e.,* they are not eligible for a performance-based program. NERC explains the rationale behind this unique treatment of DC station supply batteries as follows:

> Batteries are the only element of a Protection System that is a perishable item with a shelf life. As a perishable item batteries require not only a constant float charge to maintain their freshness (charge), but periodic inspection to determine if there are problems associated with their aging process and testing to see if they are maintaining a charge or can still deliver their rated output as required.
>
> . . .
>
> All of the above mentioned factors and several more not discussed here are beyond the control of the Functional Entities that want to use a performance-based maintenance (PBM) program for its Protection Systems. These inherent variances in the aging process of a battery cell make establishment of a designated segment based on manufacturer and type of battery impossible.[51]

39. NERC has assigned a ''lower'' violation severity level for the failure to include applicable station batteries under a time-based maintenance program. NERC states as to Requirement R1 that ''[t]here is an incremental aspect to the violation and the [violation severity levels] follow the guidelines for incremental violations,'' indicating that NERC believes the Commission's violation severity guideline for binary requirements is not applicable.[52] We believe this assignment is inconsistent with the binary nature of Part 1.1 of Requirement R1, since entities either satisfy the obligation to include station batteries in a time-based program or fail to meet the requirement in its entirety.[53] Moreover, we believe a low violation severity level designation does not properly reflect the number of historical violations associated with station battery maintenance.[54] We therefore propose to direct NERC to modify the violation severity level for violations of this element of Part 1.1 of Requirement R1 to ''severe,'' and seek comment on this proposal.

III. Information Collection Statement

40. The following collection of information contained in this Notice of Proposed Rulemaking is subject to review by the Office of Management and Budget (OMB) under section 3507(d) of the Paperwork Reduction Act of 1995.[55] OMB's regulations require approval of certain information collection requirements imposed by agency rules.[56] Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

41. We solicit comments on the Commission's need for this information, whether the information will have practical utility, the accuracy of the burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected or retained, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques. Specifically, the Commission asks that any revised burden or cost estimates submitted by commenters be supported by sufficient detail to understand how the estimates are generated.

42. The Commission proposes to approve Reliability Standard PRC–005–2, which will replace PRC–005–1.1b (Transmission and Generation Protection System Maintenance and Testing), PRC–008–0 (Underfrequency Load Shedding Equipment Maintenance), PRC–011–0 (Undervoltage Load Shedding Equipment Maintenance) and PRC–017–0 (Special Protection System Maintenance and Testing). The proposed Reliability Standard combines the requirements for maintenance and testing of protection systems, special protection systems, underfrequency load shedding equipment, and undervoltage load shedding equipment into one, comprehensive standard. In addition, the proposed Reliability Standard sets out minimum maintenance activities and maximum maintenance intervals for the various components of these systems, but also allows applicable entities to adopt performance-based maintenance intervals in certain circumstances.

43. Proposed Reliability Standard PRC–005–2 includes specific requirements about the minimum maintenance activities required for each type of applicable component, as well as a maximum time interval during which the maintenance must be completed. Because the specific requirements were designed to reflect common industry practice, entities are not expected to experience a meaningful change in actual maintenance and documentation practices. However, applicable entities will have to perform a one-time review of their current protection system maintenance programs to ensure that they meet the requirements of the revised standard PRC–005–2. Accordingly, all expected information collection costs are expected to be limited to the first year of implementation of the revised standard.

44. *Public Reporting Burden:* Our estimate below regarding the number of respondents is based on the NERC compliance registry as of June 10, 2013. According to the compliance registry, 544 entities are registered as distribution providers, 898 entities are registered as generation owners, and 346 entities are registered as transmission owners within the United States. However, due to significant overlap, the total number of these affected entities (*i.e.,* entities registered as a distribution provider, a generation owner, a transmission owner, or some combination of these three functional entities) is 867 entities.

45. Affected entities must perform a one-time review of their existing protection system maintenance program to ensure that it contains at a minimum the activities listed in Tables 1 through 3 in Reliability Standard PRC–005–2 and that the activities are performed

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[50] *See* NERC Petition, Ex. F (Technical Justification for Maintenance Intervals) at 1–2; *see also* Ex. E (Supplementary Reference and FAQ) at 36.

[51] NERC Petition, Ex. D (Technical Justification) at 8.

[52] NERC Petition, Ex. I (Discussion of Assignments of VRFs and VSLs) at 10.

[53] NERC's assignment appears to be inconsistent with its approach to the assignment of violation severity levels for binary requirements, as accepted by the Commission in 2011. *See North American Electric Reliability Corporation,* 135 FERC ¶ 61,166, at P 13 (2011) (''NERC explains that if there are degrees of noncompliance that result in performance that partially meets the reliability objective of the requirement such that the performance or product has some reliability-related value, then the requirement will have multiple violation severity levels that address a range of severity utilizing two or more of the four violation severity level categories. Requirements that are binary, i.e., 'pass/fail,' will have only one violation severity level—severe.''). Here, NERC indicates that a performance-based maintenance program for station batteries is untenable, and provides a single violation severity level relating to this portion of Requirement R1, but assigns it a ''lower'' violation severity level.

[54] *See, e.g.,* Docket Nos. NP10–34–000, NP10–160–000, NP11–107–000, NP11–154–000, NP11–162–000, NP11–164–000, NP11–181–000, NP11–186–000, NP11–209–000, NP11–215–000, NP11–252–000, NP11–255–000, NP12–10–000, NP12–18–000, NP12–26–000, NP12–30–000, NP12–36–000, NP12–40–000, NP13–8–000, NP13–33–000 (all of which include violations of PRC–005 related to maintenance and testing of station batteries or battery banks).

[55] 44 U.S.C. 3507(d) (2006).

[56] 5 CFR 1320.11 (2012).

within the applicable maximum interval listed in Tables 1 through 3. If the existing protection system maintenance program does not meet the criteria in Reliability Standard PRC–005–2, the entity will have to make certain adjustments to the program.

Requirement	Number of affected entities (1)	Number of PSMP reviewed per entity (2)	Average number of hours per review (3)	Total burden hours (4) (1)*(2)*(3)	Total cost (5) (4)*$70 [57]
One time review and adjustment of existing protection system maintenance program	867	1	8	6,936	$485,520

Title: FERC–725P, Mandatory Reliability Standards: Reliability Standard PRC–005–2.

Action: Proposed Collection of Information.

OMB Control No: To be determined.

Respondents: Business or other for-profit and not-for-profit institutions.

Frequency of Responses: One time.

Necessity of the Information: The proposed Reliability Standard PRC–005–2, if adopted, would implement the Congressional mandate of the Energy Policy Act of 2005 to develop mandatory and enforceable Reliability Standards to better ensure the reliability of the nation's Bulk-Power System. Specifically, the proposal would ensure that transmission and generation protection systems affecting the reliability of the bulk electric system are maintained and tested.

46. *Internal review:* The Commission has reviewed revised Reliability Standard PRC–005–2 and made a determination that approval of this standard is necessary to implement section 215 of the FPA. The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

47. Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, Office of the Executive Director, 888 First Street, NE., Washington, DC 20426 [Attention: Ellen Brown, email: *DataClearance@ferc.gov,* phone: (202) 502–8663, fax: (202) 273–0873].

48. Comments concerning the information collections proposed in this NOPR and the associated burden estimates, should be sent to the Commission in this docket and may also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs [Attention: Desk Officer for the Federal Energy Regulatory Commission]. For security reasons, comments should be sent by email to OMB at the following email address: *oira_submission@omb.eop.gov.* Please reference the docket number of this Notice of Proposed Rulemaking (Docket No. RM13–7–000) in your submission.

IV. Regulatory Flexibility Act Analysis

49. The Regulatory Flexibility Act of 1980 (RFA) [58] generally requires a description and analysis of Proposed Rules that will have significant economic impact on a substantial number of small entities. As discussed above, proposed Reliability Standard PRC–005–2 would apply to 867 individual entities (the number of entities registered as a distribution provider, a generator owner, a transmission owner, or any combination of those three functional entities). Comparison of the NERC Compliance Registry with data submitted to the Energy Information Administration on Form EIA–861 indicates that, of these entities, 230 may qualify as small entities.[59] Of the 230 small entities, 90 are registered as a combination of distribution providers, generator owners and transmission owners, but it is assumed that each entity would have only one comprehensive program to review.

50. The Commission estimates that, on average, each of the 230 small entities affected will have a one-time cost of $560, representing a one-time review of the program for each entity, consisting of 8 man-hours at $70/hour as explained above in the information collection statement. We do not consider this cost to be a significant economic impact for small entities. Accordingly, the Commission certifies that proposed Reliability Standard PRC–005–2 will not have a significant economic impact on a substantial number of small entities. The Commission seeks comment on this certification.

V. Environmental Analysis

51. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[60] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[61] The actions proposed herein fall within this categorical exclusion in the Commission's regulations.

VI. Comment Procedures

52. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due September 23, 2013. Comments must refer to Docket No. RM13–7–000, and must include the commenter's name, the organization they represent, if applicable, and address.

53. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The

[57] This figure is the average of the salary plus benefits for a manager and an engineer. The figures are taken from the Bureau of Labor and Statistics at (*http://bls.gov/oes/current/naics3_221000.htm*).

[58] 5 U.S.C. 601–12.

[59] The RFA definition of "small entity" refers to the definition provided in the Small Business Act (SBA), which defines a "small business concern" as a business that is independently owned and operated and that is not dominant in its field of operation. *See* 15 U.S.C. 632 (2006). According to the Small Business Administration, an electric utility is defined as "small" if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.

[60] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,783 (1987).

[61] 18 CFR 380.4(a)(2)(ii).

Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

54. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

55. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VII. Document Availability

56. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

57. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

58. User assistance is available for eLibrary and the Commission's Web site during normal business hours from the Commission's Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

By direction of the Commission.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–17730 Filed 7–23–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 118

[Docket No. FDA–2000–N–0190 (formerly Docket No. 2000N–0504)]

Draft Guidance for Industry: Questions and Answers Regarding the Final Rule, Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation (Layers With Outdoor Access); Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing the availability of a draft guidance entitled ''Guidance for Industry: Questions and Answers Regarding the Final Rule, Prevention of *Salmonella* Enteritidis in Shell Eggs During Production, Storage, and Transportation (Layers with Outdoor Access)'' (the draft guidance). The document provides guidance to egg producers on certain provisions contained in FDA's final rule entitled, ''Prevention of *Salmonella* Enteritidis in Shell Eggs During Production, Storage, and Transportation'' concerning the management of production systems that provide laying hens with access to the outdoors. Laying hens are provided outdoor access in some production systems, including certified organic production systems governed by the U.S. Department of Agriculture's National Organic Program regulations.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comments on the draft guidance before it begins work on the final version of the guidance, submit electronic or written comments on the draft guidance by September 23, 2013.

ADDRESSES: Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Submit written requests for single copies of the draft guidance to the Division of Plant and Dairy Food Safety/Office of Food Safety, Center for Food Safety and Applied Nutrition (HFS–315), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, or fax your request to 301–436–2632. Send one self-addressed adhesive label to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance.

FOR FURTHER INFORMATION CONTACT: Nancy Bufano, Center for Food Safety and Applied Nutrition (HFS–316), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 240–402–1493.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of July 9, 2009 (74 FR 33030), FDA issued a final rule requiring shell egg producers to implement measures to prevent *Salmonella* Enteritidis (SE) from contaminating eggs on the farm and from further growth during storage and transportation, and requiring these producers to maintain records concerning their compliance with the final rule and to register with FDA. The final rule became effective September 8, 2009, with a compliance date of July 9, 2010, for producers with 50,000 or more laying hens. For producers with fewer than 50,000, but at least 3,000 laying hens, the compliance date was July 9, 2012. The compliance date for persons who must comply with only the refrigeration requirements was July 9, 2010. The final rule is codified at 21 CFR part 118.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent our current thinking on how to interpret the requirements in the final rule with regard to production systems that provide laying hens with access to the outdoors, including questions and answers on coverage; definitions; SE prevention measures; and environmental sampling for SE. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternate approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in §§ 118.5, 118.6, 118.10, and 118.11 have been approved under OMB control number 0910–0660.

III. Comments

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 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.*

IV. Electronic Access

Persons with access to the Internet may obtain the draft guidance at *http://www.fda.gov/RegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.* Use the FDA Web site listed in the previous sentence to find the most current version of the guidance.

Dated: July 8, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–17750 Filed 7–23–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1140

[Docket No. FDA–2013–N–0521]

Menthol in Cigarettes, Tobacco Products; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Food and Drug Administration (FDA) is issuing this advance notice of proposed rulemaking (ANPRM) to obtain information related to the potential regulation of menthol in cigarettes. FDA is also making available its preliminary scientific evaluation of public health issues related to the use of menthol in cigarettes. The preliminary scientific evaluation indicates there is likely a public health impact of menthol in cigarettes. This ANPRM is seeking comments, including comments on FDA's preliminary evaluation, and data, research, or other information that may inform regulatory actions FDA might take with respect to menthol in cigarettes.

DATES: Submit either electronic or written comments by September 23, 2013.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2013–N–0521, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

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

Written Submissions

Submit written submissions in the following ways:

- *Mail/Hand delivery/Courier (for paper or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2013–N–0521 for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Annette L. Marthaler, Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850–3229, 877–287–1373, *CTPRegulations@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Family Smoking Prevention and Tobacco Control Act, enacted on June 22, 2009, amends the Federal Food, Drug, and Cosmetic Act (the FD&C Act) and provides FDA with the authority to regulate tobacco products (Pub. L. 111–31, 123 Stat. 1776). Among other things, section 907(e) of the FD&C Act (21 U.S.C 387g(e)) requires FDA's Tobacco Products Scientific Advisory Committee (TPSAC) to submit a report and recommendations to the Secretary of Health and Human Services (the Secretary of HHS) on the impact of the use of menthol in cigarettes on the public health, including use among children, African Americans, Hispanics, and other racial/ethnic minorities.

TPSAC has submitted the report to HHS, available at *http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf.* In addition, the nonvoting industry representatives of TPSAC submitted a separate document reflecting the industry perspective, available at *http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM249320.pdf.* Two cigarette manufacturers have challenged FDA's ability to rely on TPSAC's menthol report, and that case is currently pending (*Lorillard, Inc.* v. *FDA,* No. 11–440 (D.D.C.)).

Experts within FDA's Center for Tobacco Products (CTP) also initiated an independent evaluation of the available science related to the impact of the use of menthol in cigarettes on public health including peer-reviewed literature, secondary data analyses, and independent CTP analyses of relevant large data sets. This preliminary independent evaluation is entitled ''Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol Versus Nonmenthol Cigarettes'' (the evaluation) (Ref. 1). The evaluation has been peer reviewed, and the peer review report is available on FDA's Web site at *http://www.fda.gov/ScienceResearch/SpecialTopics/PeerReviewofScientificInformationandAssessments/ucm079120.htm.* FDA is also making available an addendum with articles published since the evaluation was submitted for peer review in 2011 (Ref. 2).

As discussed previously, the FD&C Act provides FDA with authority to regulate tobacco products. This includes authority to adopt a tobacco product standard under section 907 of the FD&C Act if the Secretary of HHS finds that a tobacco product standard is appropriate for the protection of public health and includes authority to amend an existing product standard. In making such a finding, the Secretary of HHS must consider scientific evidence concerning: (1) The risks and benefits to the population as a whole, including users and nonusers of tobacco products, of the product standard; (2) the increased or decreased likelihood that existing users of tobacco products will stop using such products; and (3) the increased or decreased likelihood that those who do not use tobacco products will start using such products. The FD&C Act also provides FDA with authority to, by regulation, require restrictions on the sale and distribution of a tobacco product (section 906(d)(1) of the FD&C Act (21 U.S.C. 387f(d)(1))). The restrictions on sale and distribution of a tobacco product may include restrictions on the access to, and the advertising and promotion of, the tobacco product, if the Secretary of HHS determines such regulation would be appropriate for the public health.

FDA intends to use the information submitted in response to this **Federal Register** document, FDA's preliminary independent scientific evaluation, and other appropriate information to inform its thinking about options for regulating menthol in cigarettes.

II. Request for Comments and Information

FDA is seeking comments, including comments on its preliminary evaluation, and data, research (e.g., published or unpublished studies, case studies), and any other information related to the following questions. Please explain your responses and provide any evidence or other information supporting your responses to the following questions:

A. Tobacco Product Standards

1. Should FDA consider establishing a tobacco product standard for menthol in menthol cigarettes? If so, what allowable level of menthol (e.g., maximum or minimum) would be appropriate for the protection of the public health?
2. Rather than a tobacco product standard for menthol in menthol cigarettes, should FDA consider a tobacco product standard for any additive, constituent, artificial or natural flavor, or other ingredient that produces a characterizing flavor of menthol in the tobacco product or its smoke?
3. If a tobacco product standard for menthol in menthol cigarettes were to be established, should FDA consider issuing regulations to address menthol in other tobacco products besides cigarettes? If so, what other tobacco products with menthol should be regulated: All tobacco products, just all combusted tobacco products, or some other category or group of tobacco products? If not, what distinctions should be made between products?
4. If a product standard prohibiting or limiting menthol were to be established, what length of time should manufacturers be provided to achieve compliance with the standard? If a product standard prohibiting or limiting menthol were to be established, would a stepped approach in which the level of menthol was gradually reduced be appropriate for the protection of the public health?
5. If a product standard limiting menthol were to be established, are there alternatives that could be substituted by manufacturers to maintain the effect or appeal of menthol to menthol cigarette smokers and potential initiators? If so, what are these substitutes? Should they be regulated if menthol is regulated; and if so, how should they be regulated? If not, what distinctions should be made between menthol and potential substitutes?

B. Sale and Distribution Restrictions

1. Should FDA consider establishing restrictions on the sale and/or distribution of menthol cigarettes? If so, what restrictions would be appropriate and what would be the impact on youth or adult smoking behavior, initiation, and cessation?
2. Should FDA consider establishing restrictions on the advertising and promotion of menthol cigarettes? If so, what restrictions would be appropriate and what would be the impact on youth or adult smoking behavior, initiation, and cessation?

C. Other Actions and Considerations

1. Are there other tobacco product standards, regulatory, or other actions that FDA could implement that would more effectively reduce the harms caused by menthol cigarette smoking and better protect the public health than the tobacco product standards or regulatory actions discussed in the preceding questions?
2. To the extent that you have identified a tobacco product standard or other regulatory action in response to the prior questions, please provide additional information and comments on:

2.1 Is compliance with the tobacco product standard or other regulatory action you identified technically achievable?

2.2 How FDA would structure a corresponding rule to maximize compliance, facilitate enforcement, and otherwise maximize public health benefits?

3. If menthol cigarettes could no longer be legally sold, is there evidence that illicit trade in menthol cigarettes would become a significant problem? If so what would be the impact of any such illicit trade on public health? How would any such illicit trade compare to the existing illicit trade in cigarettes?
4. What additional information and research beyond that described in the evaluation is there on the potential impact of sale and distribution restrictions of menthol cigarettes on specific subpopulations, such as those based on racial, ethnic, socioeconomic status, and sexuality/gender identity?
5. To what extent are you aware of current (within the past 5 years) advertising and/or promotion of menthol cigarettes that have targeted specific communities, subpopulations, and locations, beyond that described in the evaluation?
6. Might any current advertising or other marketing or public statements concerning menthol cigarettes, or menthol in other tobacco products, constitute reduced risk claims?

III. Comments

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 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.*

IV. 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.*

1. CTP, Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol Versus Nonmenthol Cigarettes.
2. CTP, Reference Addendum to the ''Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol versus Nonmenthol Cigarettes, 2013.''

Dated: July 19, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–17805 Filed 7–23–13; 8:45 am]

BILLING CODE 4160–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50, 51, 70 and 71

[EPA–HQ–OAR–2010–0885, FRL–9836–5]

Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of extension of comment period.

SUMMARY: The EPA is announcing an extension of the public comment period on the Proposed Rule Regarding ''Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements'' (June 6, 2013). The EPA is extending the comment period that originally was scheduled to end on August 5, 2013. The extended comment period will close on September 4, 2013. The EPA is extending the comment period because of a request we received in a timely manner.

DATES: *Comments.* Comments must be received on or before September 4, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0885, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.*
- *Mail:* Air and Radiation Docket and Information Center, Attention Docket ID No. EPA–HQ–OAR–2010–0885, Environmental Protection Agency, 1301 Constitution Ave. NW., Washington, DC 20460. Mail Code: 2822T. Please include two copies if possible. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.
- *Hand Delivery:* Air and Radiation Docket and Information Center, Attention Docket ID No. EPA–HQ–OAR–2010–0885, Environmental Protection Agency in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2010–0885. The EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line 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 CD 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 and any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in *www.regulations.gov.* Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave. 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.

FOR FURTHER INFORMATION CONTACT: For further general information on this rulemaking, contact Dr. Karl Pepple, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, by phone at (206) 553–1778, or by email at *pepple.karl@epa.gov;* or Mr. Butch Stackhouse, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, by phone at (919) 541-5208, or by email at *stackhouse.butch@epa.gov.* For information on the public hearings, contact Ms. Pamela S. Long by phone at (919) 541–0641 or by email at *long.pam@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected directly by this proposal include state, local and tribal governments. Entities potentially affected indirectly by this proposal include owners and operators of sources of emissions (volatile organic compounds (VOCs) and nitrogen oxides (NO_X)) that contribute to ground-level ozone formation.

B. What should I consider as I prepare my comments for the EPA?

1. Submitting CBI. Do not submit CBI 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 on 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 to be CBI must be submitted for inclusion in the public docket. Information marked CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments. When submitting comments, remember to:

- 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 notice will be posted at *http://www.epa.gov/air/ozonepollution/actions.html#impl.*

Dated: July 17, 2013.

Mary E. Henigin,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. 2013–17830 Filed 7–23–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R03–OAR–2012–0368; FRL–9836–1]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Redesignation of the West Virginia Portion of the Wheeling, WV–OH 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment and Approval of the Associated Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; supplemental.

SUMMARY: EPA is issuing a supplement to its proposed approval of the State of West Virginia's request to redesignate the West Virginia portion of the Wheeling, WV–OH fine particulate matter ($PM_{2.5}$) nonattainment area (Wheeling Area or Area) to attainment for the 1997 annual $PM_{2.5}$ national ambient air quality standard (NAAQS). This supplemental proposal revises and expands the basis for proposing approval of the State's request in light of developments since EPA issued its initial proposal on December 11, 2012. This supplemental proposal addresses the effects of the decision of the United States Court of Appeals for the District of Columbia (D.C. Circuit Court) on January 4, 2013 to remand to EPA two final rules implementing the $PM_{2.5}$ NAAQS. EPA is seeking comment only on the issues raised in this supplemental proposal and is not reopening for comment other issues raised in its prior proposal.

DATES: Written comments must be received on or before August 23, 2013.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2012–0368 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2012–0368, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. 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–R03–OAR–2012–0368. 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 EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE., Charleston, West Virginia 25304.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by email at *quinto.rose@epa.gov.*

Table of Contents

I. Background

On March 8, 2012, the State of West Virginia through the West Virginia Department of Environmental Protection (WVDEP) formally submitted a request to redesignate the West Virginia portion of the Wheeling Area from nonattainment to attainment of the 1997 annual $PM_{2.5}$ NAAQS. Concurrently, West Virginia submitted a maintenance plan for the Area as a SIP revision to ensure continued attainment throughout the Area over the next 10 years.

On December 11, 2012 (77 FR 73575), EPA published a notice of proposed rulemaking (NPR) determining that the Wheeling Area has attained the 1997 annual $PM_{2.5}$ NAAQS and that the Area has met the requirements for redesignation under section 107(d)(3)(E) of the Clean Air Act (CAA). In the December 11, 2012 NPR, EPA proposed several actions related to the redesignation of the Area to attainment for the 1997 annual $PM_{2.5}$ NAAQS. First, EPA proposed to approve West Virginia's request to change the legal definition of the West Virginia portion of the Wheeling Area from nonattainment to attainment for the

1997 annual $PM_{2.5}$ NAAQS. Second, EPA proposed to approve the maintenance plan for the West Virginia portion of the Area as a revision to the West Virginia SIP because the plan meets the requirements of section 175A of the CAA. Third, EPA proposed to approve the insignificance determination for the onroad motor vehicle contribution of $PM_{2.5}$, nitrogen oxides (NO_X) and sulfur dioxide (SO_2) in the West Virginia portion of the Area for transportation conformity purposes. Fourth, EPA proposed to approve the base year emissions inventory for $PM_{2.5}$ (including condensables), SO_2 and NO_X emissions. The emissions cover the general source categories of point sources, area sources, onroad mobile sources and nonroad mobile sources. EPA received no comments in response to the December 11, 2012 NPR proposing approval of the above described redesignation request, maintenance plan, insignificance determination and the base year emissions inventory. EPA is not reopening the public comment period to submit comment on the issues addressed in the December 11, 2012 NPR.

EPA today is issuing a supplement to its December 11, 2012 NPR. This supplemental NPR addresses the recent decision of the D.C. Circuit Court which affects the proposed redesignation and which has arisen since the issuance of the NPR. The D.C. Circuit Court on January 4, 2013 remanded to EPA two final rules implementing the $PM_{2.5}$ NAAQS. Therefore, EPA's supplemental proposal revises and expands the basis for EPA's proposed approval of West Virginia's request to redesignate the Wheeling Area to attainment for the 1997 annual $PM_{2.5}$ NAAQS, in light of this development since EPA's initial NPR.

II. Effect of the January 4, 2013 D.C. Circuit Decision Regarding the $PM_{2.5}$ Implementation Under Subpart 4

A. Background

On January 4, 2013, in *Natural Resources Defense Council* v. *EPA,* the D.C. Circuit Court remanded to EPA the ''Final Clean Air Fine Particle Implementation Rule'' (72 FR 20586 April 25, 2007) and the ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$)'' final rule (73 FR 28321, May 16, 2008) (collectively, ''1997 $PM_{2.5}$ Implementation Rule''). 706 F.3d 428 (D.C. Cir. 2013). The D.C. Circuit Court found that EPA erred in implementing the 1997 $PM_{2.5}$ NAAQS pursuant to the general implementation provisions of subpart 1 of Part D of Title I of the CAA, rather than the particulate-matter-specific provisions of subpart 4 of Part D of Title I.

B. Supplemental Proposal on This Issue

In this portion of EPA's supplemental proposal, EPA is soliciting comment on the limited issue of the effect of the D.C. Circuit Court's January 4, 2013 ruling on the proposed redesignation. As explained below, EPA is proposing to determine that the D.C. Circuit Court's January 4, 2013 decision does not prevent EPA from redesignating the Wheeling Area to attainment. Even in light of the D.C. Circuit Court's decision, redesignation for this Area is appropriate under the CAA and EPA's longstanding interpretations of the CAA's provisions regarding redesignation. EPA first explains its longstanding interpretation that requirements that are imposed, or that become due, after a complete redesignation request is submitted for an area that is attaining the standard, are not applicable for purposes of evaluating a redesignation request. Second, EPA then shows that, even if EPA applies the subpart 4 requirements to the Wheeling Area redesignation request and disregards the provisions of its 1997 $PM_{2.5}$ implementation rule recently remanded by the D.C. Circuit Court, the State's request for redesignation of this Area still qualifies for approval. EPA's discussion takes into account the effect of the D.C. Circuit Court's ruling on the Area's maintenance plan, which EPA views as approvable when subpart 4 requirements are considered.

1. Applicable Requirements for Purposes of Evaluating the Redesignation Request

With respect to the 1997 $PM_{2.5}$ Implementation Rule, the D.C. Circuit Court's January 4, 2013 ruling rejected EPA's reasons for implementing the $PM_{2.5}$ NAAQS solely in accordance with the provisions of subpart 1, and remanded that matter to EPA, so that it could address implementation of the 1997 $PM_{2.5}$ NAAQS under subpart 4 of Part D of the CAA, in addition to subpart 1. For the purposes of evaluating West Virginia's redesignation request for the Wheeling Area, to the extent that implementation under subpart 4 would impose additional requirements for areas designated nonattainment, EPA believes that those requirements are not ''applicable'' for the purposes of section 107(d)(3)(E) of the CAA, and thus EPA is not required to consider subpart 4 requirements with respect to the Wheeling Area redesignation. Under its longstanding interpretation of the CAA, EPA has interpreted section 107(d)(3)(E) to mean, as a threshold matter, that the part D provisions which are ''applicable'' and which must be approved in order for EPA to redesignate an area include only those which came due prior to a state's submittal of a complete redesignation request. *See* ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (Calcagni memorandum). *See also* ''State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) on or after November 15, 1992,'' Memorandum from Michael Shapiro, Acting Assistant Administrator, Air and Radiation, September 17, 1993 (Shapiro memorandum); Final Redesignation of Detroit-Ann Arbor, (60 FR 12459, 12465–66, March 7, 1995); Final Redesignation of St. Louis, Missouri, (68 FR 25418, 25424–27, May 12, 2003); *Sierra Club* v. *EPA,* 375 F.3d 537, 541 (7th Cir. 2004) (upholding EPA's redesignation rulemaking applying this interpretation and expressly rejecting Sierra Club's view that the meaning of ''applicable'' under the statute is ''whatever should have been in the plan at the time of attainment rather than whatever actually was in the plan and already implemented or due at the time of attainment'').[1] In this case, at the time that West Virginia submitted its redesignation request, requirements under subpart 4 were not due, and indeed, were not yet known to apply.

EPA's view that, for purposes of evaluating the Wheeling Area redesignation, the subpart 4 requirements were not due at the time West Virginia submitted the redesignation request is in keeping with the EPA's interpretation of subpart 2 requirements for subpart 1 ozone areas redesignated subsequent to the D.C. Circuit Court's decision in *South Coast Air Quality Mgmt. Dist.* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006). In *South Coast,* the D.C Circuit Court found that EPA was not permitted to implement the 1997 8-hour ozone standard solely under subpart 1, and held that EPA was required under the statute to implement

[1] Applicable requirements of the CAA that come due subsequent to the area's submittal of a complete redesignation request remain applicable until a redesignation is approved, but are not required as a prerequisite to redesignation. Section 175A(c) of the CAA.

the standard under the ozone-specific requirements of subpart 2 as well. Subsequent to the *South Coast* decision, in evaluating and acting upon redesignation requests for the 1997 8-hour ozone standard that were submitted to EPA for areas under subpart 1, EPA applied its longstanding interpretation of the CAA that ''applicable requirements,'' for purposes of evaluating a redesignation, are those that had been due at the time the redesignation request was submitted. *See, e.g.,* Proposed Redesignation of Manitowoc County and Door County Nonattainment Areas (75 FR 22047, 22050, April 27, 2010). In those actions, EPA therefore did not consider subpart 2 requirements to be ''applicable'' for the purposes of evaluating whether the area should be redesignated under section 107(d)(3)(E) of the CAA.

EPA's interpretation derives from the provisions of section 107(d)(3) of the CAA. Section 107(d)(3)(E)(v) states that, for an area to be redesignated, a state must meet ''all requirements 'applicable' to the area under section 110 and part D.'' Section 107(d)(3)(E)(ii) provides that EPA must have fully approved the ''applicable'' SIP for the area seeking redesignation. These two sections read together support EPA's interpretation of ''applicable'' as only those requirements that came due prior to submission of a complete redesignation request.

First, holding states to an ongoing obligation to adopt new CAA requirements that arose after the state submitted its redesignation request, in order to be redesignated, would make it problematic or impossible for EPA to act on redesignation requests in accordance with the 18-month deadline Congress set for EPA action in section 107(d)(3)(D) of the CAA. If ''applicable requirements'' were interpreted to be a continuing flow of requirements with no reasonable limitation, states, after submitting a redesignation request, would be forced continuously to make additional SIP submissions that in turn would require EPA to undertake further notice-and-comment rulemaking actions to act on those submissions. This would create a regime of unceasing rulemaking that would delay action on the redesignation request beyond the 18-month timeframe provided by the CAA for this purpose.

Second, a fundamental premise for redesignating a nonattainment area to attainment is that the area has attained the relevant NAAQS due to emission reductions from existing controls. Thus, an area for which a redesignation request has been submitted would have already attained the NAAQS as a result of satisfying statutory requirements that came due prior to the submission of the request. Absent a showing that unadopted and unimplemented requirements are necessary for future maintenance, it is reasonable to view the requirements applicable for purposes of evaluating the redesignation request as including only those SIP requirements that have already come due. These are the requirements that led to attainment of the NAAQS. To require, for redesignation approval, that a state also satisfy additional SIP requirements coming due after the state submits its complete redesignation request, and while EPA is reviewing it, would compel the state to do more than is necessary to attain the NAAQS, without a showing that the additional requirements are necessary for maintenance.

In the context of the Wheeling redesignation, the timing and nature of the D.C. Circuit Court's January 4, 2013 decision in *NRDC* v. *EPA* compound the consequences of imposing requirements that come due after the redesignation request is submitted. West Virginia submitted its redesignation request on March 8, 2012, but the D.C. Circuit Court did not issue its decision remanding EPA's 1997 $PM_{2.5}$ implementation rule concerning the applicability of the provisions of subpart 4 until January 2013.

To require West Virginia's fully-completed and long-pending redesignation request to comply now with requirements of subpart 4 that the D.C. Circuit Court announced only on January 4, 2013, would be to give retroactive effect to such requirements when the State had no notice that it was required to meet them. The D.C. Circuit Court recognized the inequity of this type of retroactive impact in *Sierra Club* v. *Whitman,* 285 F.3d 63 (D.C. Cir. 2002),[2] where it upheld the D.C. District Court's ruling refusing to make retroactive EPA's determination that the St. Louis area did not meet its attainment deadline. In that case, petitioners urged the D.C. Circuit Court to make EPA's nonattainment determination effective as of the date that the statute required, rather than the later date on which EPA actually made the determination. The D.C. Circuit Court rejected this view, stating that applying it ''would likely impose large costs on States, which would face fines and suits for not implementing air pollution prevention plans . . . even though they were not on notice at the time.'' *Id.* at 68. Similarly, it would be unreasonable to penalize West Virginia by rejecting its redesignation request for an area that is already attaining the 1997 $PM_{2.5}$ standard and that met all applicable requirements known to be in effect at the time of the request. For EPA now to reject the redesignation request solely because the state did not expressly address subpart 4 requirements of which it had no notice, would inflict the same unfairness condemned by the D.C. Circuit Court in *Sierra Club* v. *Whitman.*

2. Subpart 4 Requirements and Wheeling Area's Redesignation Request

Even if EPA were to take the view that the D.C. Circuit Court's January 4, 2013 decision requires that, in the context of pending redesignations, subpart 4 requirements were due and in effect at the time the State submitted its redesignation request, EPA proposes to determine that the Wheeling Area still qualifies for redesignation to attainment. As explained below, EPA believes that the redesignation request for the Wheeling Area, though not expressed in terms of subpart 4 requirements, substantively meets the requirements of that subpart for purposes of redesignating the area to attainment.

With respect to evaluating the relevant substantive requirements of subpart 4 for purposes of redesignating the Wheeling Area, EPA notes that subpart 4 incorporates components of subpart 1 of part D, which contains general air quality planning requirements for areas designated as nonattainment. *See* Section 172(c). Subpart 4 itself contains specific planning and scheduling requirements for PM_{10}[3] nonattainment areas, and under the D.C. Circuit Court's January 4, 2013 decision in *NRDC* v. *EPA,* these same statutory requirements also apply for $PM_{2.5}$ nonattainment areas. EPA has longstanding general guidance that interprets the 1990 amendments to the CAA, making recommendations to states for meeting the statutory requirements for SIPs for nonattainment areas. *See,* ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' (57 FR 13498, April 16, 1992) (the ''General Preamble''). In the General Preamble, EPA discussed the relationship of subpart 1 and subpart 4

[2] *Sierra Club* v. *Whitman* was discussed and distinguished in a recent D.C. Circuit Court decision that addressed retroactivity in a quite different context, where, unlike the situation here, EPA sought to give its regulations retroactive effect. *National Petrochemical and Refiners Ass'n* v. *EPA.* 630 F.3d 145, 163 (D.C. Cir. 2010), rehearing denied 643 F.3d 958 (D.C. Cir. 2011), cert denied 132 S. Ct. 571 (2011).

[3] PM_{10} refers to particulates nominally 10 micrometers in diameter or smaller.

SIP requirements, and pointed out that subpart 1 requirements were to an extent ''subsumed by, or integrally related to, the more specific PM_{10} requirements.'' (57 FR 13538, April 16, 1992). EPA's December 11, 2012 NPR for this redesignation action addressed how the Wheeling Area meets the requirements for redesignation under subpart 1. These subpart 1 requirements include, among other things, provisions for attainment demonstrations, reasonably available control measures (RACM), reasonable further progress (RFP), emissions inventories, and contingency measures.

For the purposes of this redesignation, in order to identify any additional requirements which would apply under subpart 4, EPA is considering the Wheeling Area to be a ''moderate'' $PM_{2.5}$ nonattainment area. Under section 188 of the CAA, all areas designated nonattainment areas under subpart 4 would initially be classified by operation of law as ''moderate'' nonattainment areas, and would remain moderate nonattainment areas unless and until EPA reclassifies the area as a ''serious'' nonattainment area. Accordingly, EPA believes that it is appropriate to limit the evaluation of the potential impact of subpart 4 requirements to those that would be applicable to moderate nonattainment areas. Sections 189(a) and (c) of subpart 4 apply to moderate nonattainment areas and include the following: (1) An approved permit program for construction of new and modified major stationary sources (section 189(a)(1)(A)); (2) an attainment demonstration (section 189(a)(1)(B)); (3) provisions for RACM (section 189(a)(1)(C)); and (4) quantitative milestones demonstrating RFP toward attainment by the applicable attainment date (section 189(c)).

The permit requirements of subpart 4, as contained in section 189(a)(1)(A), refer to and apply the subpart 1 permit provisions requirements of sections 172 and 173 to PM_{10}, without adding to them. Consequently, EPA believes that section 189(a)(1)(A) does not itself impose for redesignation purposes any additional requirements for moderate areas beyond those contained in subpart 1.[4] In any event, in the context of redesignation, EPA has long relied on the interpretation that a fully approved nonattainment new source review program is not considered an applicable requirement for redesignation, provided the area can maintain the standard with a prevention of significant deterioration (PSD) program after redesignation. A detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.'' *See also* rulemakings for Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); and Grand Rapids, Michigan (61 FR 31834–31837, June 21, 1996).

With respect to the specific attainment planning requirements under subpart 4,[5] when EPA evaluates a redesignation request under either subpart 1 and/or 4, any area that is attaining the $PM_{2.5}$ standard is viewed as having satisfied the attainment planning requirements for these subparts. For redesignations, EPA has for many years interpreted attainment-linked requirements as not applicable for areas attaining the standard. In the General Preamble, EPA stated that: ''The requirements for RFP will not apply in evaluating a request for redesignation to attainment since, at a minimum, the air quality data for the area must show that the area has already attained. Showing that the State will make RFP towards attainment will, therefore, have no meaning at that point.'' *See* General Preamble for the Interpretation of Title I of the Clean Air Act Amendments of 1990; (57 FR 13498, 13564, April 16, 1992).

The General Preamble also explained that: ''[t]he section 172(c)(9) requirements are directed at ensuring RFP and attainment by the applicable date. These requirements no longer apply when an area has attained the standard and is eligible for redesignation. Furthermore, section 175A for maintenance plans . . . provides specific requirements for contingency measures that effectively supersede the requirements of section 172(c)(9) for these areas.'' *Id.* EPA similarly stated in its 1992 Calcagni memorandum that, ''The requirements for reasonable further progress and other measures needed for attainment will not apply for redesignations because they only have meaning for areas not attaining the standard.''

It is evident that even if we were to consider the D.C. Circuit Court's January 4, 2013 decision in *NRDC* v. *EPA* to mean that attainment-related requirements specific to subpart 4 should be imposed retroactively[6] and thus are now past due, those requirements do not apply to an area that is attaining the 1997 $PM_{2.5}$ standard, for the purpose of evaluating a pending request to redesignate the area to attainment. EPA has consistently enunciated this interpretation of applicable requirements under section 107(d)(3)(E) of the CAA since the General Preamble was published more than twenty years ago. Courts have recognized the scope of EPA's authority to interpret ''applicable requirements'' in the redesignation context. *See Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004).

Moreover, even outside the context of redesignations, EPA has viewed the obligations to submit attainment-related SIP planning requirements of subpart 4 as inapplicable for areas that EPA determines are attaining the standard. EPA's prior ''Clean Data Policy'' rulemakings for the PM_{10} NAAQS, also governed by the requirements of subpart 4, explain EPA's reasoning. They describe the effects of a determination of attainment on the attainment-related SIP planning requirements of subpart 4. *See* ''Determination of Attainment for Coso Junction Nonattainment Area,'' (75 FR 27944, May 19, 2010). *See also* Coso Junction proposed PM_{10} redesignation, (75 FR 36023, 36027, June 24, 2010); Proposed and Final Determinations of Attainment for San Joaquin Nonattainment Area (71 FR 40952, 40954–55, July 19, 2006; and 71 FR 63641, 63643–47 October 30, 2006). In short, EPA in this context has also long concluded that to require states to meet superfluous SIP planning requirements is not necessary and not required by the CAA, so long as those areas continue to attain the relevant NAAQS.

In its December 11, 2012 NPR for this action, EPA proposed to determine that the Wheeling Area has attained the 1997 $PM_{2.5}$ NAAQS and therefore meets the attainment-related plan requirements of subpart 1. Under its longstanding interpretation, EPA is proposing to determine here that the Area also meets the attainment-related plan requirements of subpart 4.

Thus, EPA is proposing to conclude that the requirements to submit an attainment demonstration under 189(a)(1)(B), a RACM determination under section 172(c)(1) and section 189(a)(1)(c), and a RFP demonstration under 189(c)(1) are satisfied for

[4] The potential effect of section 189(e) on section 189(a)(1)(A) for purposes of evaluating this redesignation is discussed below.

[5] I.e., attainment demonstration, RFP, RACM, milestone requirements, contingency measures.

[6] As EPA has explained above, we do not believe that the D.C. Circuit Court's January 4, 2013 decision should be interpreted so as to impose these requirements on the states retroactively. *Sierra Club* v. *Whitman, supra.*

purposes of evaluating the redesignation request.

3. Subpart 4 and Control of $PM_{2.5}$ Precursors

The D.C. Circuit Court in *NRDC* v. *EPA* remanded to EPA the two rules at issue in the case with instructions to EPA to re-promulgate them consistent with the requirements of subpart 4. The D.C. Circuit Court's opinion raises the issue of the appropriate approach to addressing $PM_{2.5}$ precursors in this and future EPA actions. While past implementation of subpart 4 for PM_{10} has allowed for control of PM_{10} precursors such as NO_X from major stationary, mobile, and area sources in order to attain the standard as expeditiously as practicable, CAA section 189(e) specifically provides that control requirements for major stationary sources of direct PM_{10} shall also apply to PM_{10} precursors from those sources, except where EPA determines that major stationary sources of such precursors ''do not contribute significantly to PM_{10} levels which exceed the standard in the area.''

EPA's 1997 $PM_{2.5}$ Implementation Rule, remanded by the D.C. Circuit Court, contained rebuttable presumptions concerning certain $PM_{2.5}$ precursors applicable to attainment plans and control measures related to those plans. Specifically, in 40 CFR 51.1002, EPA provided, among other things, that a state was ''not required to address VOC [and NH_3] as . . . $PM_{2.5}$ attainment plan precursor[s] and to evaluate sources of VOC [and NH_3] emissions in the State for control measures.'' EPA intended these to be rebuttable presumptions. EPA established these presumptions at the time because of uncertainties regarding the emission inventories for these pollutants and the effectiveness of specific control measures in various regions of the country in reducing $PM_{2.5}$ concentrations. EPA also left open the possibility for such regulation of NH_3 and VOC in specific areas where that was necessary.

The D.C. Circuit Court in its January 4, 2013 decision made reference to both section 189(e) and 40 CFR 51.1002, and stated that, ''In light of our disposition, we need not address the petitioners' challenge to the presumptions in [40 CFR 51.1002] that volatile organic compounds and ammonia are not $PM_{2.5}$ precursors, as subpart 4 expressly governs precursor presumptions.'' *NRDC* v. *EPA,* at 27, n.10.

Elsewhere in the D.C. Circuit Court's opinion, however, the Court observed: ''NH_3 is a precursor to fine particulate matter, making it a precursor to both $PM_{2.5}$ and PM_{10}. For a PM_{10} nonattainment area governed by subpart 4, a precursor is presumptively regulated. *See* 42 U.S.C. 7513a(e) [section 189(e)].'' *Id.* at 21, n.7.

For a number of reasons, EPA believes that its proposed redesignation of the Wheeling Area is consistent with the D.C. Circuit Court's decision on this aspect of subpart 4. First, while the D.C. Circuit Court, citing section 189(e), stated that ''for a PM_{10} area governed by subpart 4, a precursor is 'presumptively regulated,' '' the D.C. Circuit Court expressly declined to decide the specific challenge to EPA's 1997 $PM_{2.5}$ implementation rule provisions regarding NH_3 and VOC as precursors. The D.C. Circuit Court had no occasion to reach whether and how it was substantively necessary to regulate any specific precursor in a particular $PM_{2.5}$ nonattainment area, and did not address what might be necessary for purposes of acting upon a redesignation request.

However, even if EPA takes the view that the requirements of subpart 4 were deemed applicable at the time the state submitted the redesignation request, and disregards the implementation rule's rebuttable presumptions regarding NH_3 and VOC as $PM_{2.5}$ precursors, the regulatory consequence would be to consider the need for regulation of all precursors from any sources in the area to demonstrate attainment and to apply the section 189(e) provisions to major stationary sources of precursors. In the case of Wheeling Area, EPA believes that doing so would not affect the approvability of the proposed redesignation of the Area for the 1997 $PM_{2.5}$ standard. The Wheeling Area has attained the standard without any specific additional controls of NH_3 and VOC emissions from any sources in the area.

Precursors in subpart 4 are specifically regulated under the provisions of section 189(e), which requires, with important exceptions, control requirements for major stationary sources of PM_{10} precursors.[7] Under subpart 1 and EPA's prior implementation rule, all major stationary sources of $PM_{2.5}$ precursors were subject to regulation, with the exception of NH_3 and VOC. Thus we must address here whether additional controls of NH_3 and VOC from major stationary sources are required under section 189(e) of subpart 4 in order to redesignate the Wheeling Area for the 1997 $PM_{2.5}$ standard. As explained below, we do not believe that any additional controls of NH_3 and VOC are required in the context of this redesignation.

In the General Preamble, EPA discusses its approach to implementing section 189(e). *See* 57 FR 13538–13542. With regard to precursor regulation under section 189(e), the General Preamble explicitly stated that control of VOCs under other CAA requirements may suffice to relieve a state from the need to adopt precursor controls under section 189(e). *See* 57 FR 13542. EPA in this supplemental proposal proposes to determine that the West Virginia SIP has met the provisions of section 189(e) with respect to NH_3 and VOCs as precursors. This proposed supplemental determination is based on our findings that (1) the Wheeling Area contains no major stationary sources of NH_3, and (2) existing major stationary sources of VOC are adequately controlled under other provisions of the CAA regulating the ozone NAAQS.[8] In the alternative, EPA proposes to determine that, under the express exception provisions of section 189(e), and in the context of the redesignation of the Wheeling Area, which is attaining the 1997 annual $PM_{2.5}$ standard, at present NH_3 and VOC precursors from major stationary sources do not contribute significantly to levels exceeding the 1997 annual $PM_{2.5}$ standard in the Wheeling Area. *See* 57 FR 13539–42.

EPA notes that its 1997 $PM_{2.5}$ implementation rule provisions in 40 CFR 51.1002 were not directed at evaluation of $PM_{2.5}$ precursors in the context of redesignation, but at SIP plans and control measures required to bring a nonattainment area into attainment of the 1997 $PM_{2.5}$ NAAQS. By contrast, redesignation to attainment primarily requires the area to have already attained due to permanent and enforceable emission reductions, and to demonstrate that controls in place can continue to maintain the standard. Thus, even if we regard the D.C. Circuit Court's January 4, 2013 decision as calling for ''presumptive regulation'' of NH_3 and VOC for $PM_{2.5}$ under the attainment planning provisions of subpart 4, those provisions in and of themselves do not require additional controls of these precursors for an area that already qualifies for redesignation. Nor does EPA believe that requiring

[7] Under either subpart 1 or subpart 4, for purposes of demonstrating attainment as expeditiously as practicable, a state is required to evaluate all economically and technologically feasible control measures for direct PM emissions and precursor emissions, and adopt those measures that are deemed reasonably available.

[8] The Wheeling Area has reduced VOC emissions through the implementation of various control programs including VOC Reasonably Available Control Technology regulations (45CSR21) and various on-road and non-road motor vehicle control programs.

West Virginia to address precursors differently than they have already would result in a substantively different outcome.

Although, as EPA has emphasized, its consideration here of precursor requirements under subpart 4 is in the context of a redesignation to attainment, EPA's existing interpretation of subpart 4 requirements with respect to precursors in attainment plans for PM_{10} contemplates that states may develop attainment plans that regulate only those precursors that are necessary for purposes of attainment in the area in question, i.e., states may determine that only certain precursors need be regulated for attainment and control purposes.[9] Courts have upheld this approach to the requirements of subpart 4 for PM_{10}.[10] EPA believes that application of this approach to $PM_{2.5}$ precursors under subpart 4 is reasonable. Because the Wheeling Area has already attained the 1997 annual $PM_{2.5}$ NAAQS with its current approach to regulation of $PM_{2.5}$ precursors, EPA believes that it is reasonable to conclude in the context of this redesignation that there is no need to revisit the attainment control strategy with respect to the treatment of precursors. Even if the D.C. Circuit Court's decision is construed to impose an obligation, in evaluating this redesignation request, to consider additional precursors under subpart 4, it would not affect EPA's approval here of West Virginia's request for redesignation of the Wheeling Area. In the context of a redesignation, the Area has shown that it has attained the standard. Moreover, the State has shown and EPA has proposed to determine that attainment in this Area is due to permanent and enforceable emissions reductions on all precursors necessary to provide for continued attainment. It follows logically that no further control of additional precursors is necessary. Accordingly, EPA does not view the January 4, 2013 decision of the D.C. Circuit Court as precluding redesignation of the Wheeling Area to attainment for the 1997 $PM_{2.5}$ NAAQS at this time.

In summary, even if West Virginia were required to address precursors for the Wheeling Area under subpart 4 rather than under subpart 1, as interpreted in EPA's remanded $PM_{2.5}$ implementation rule, EPA would still conclude that the area had met all applicable requirements for purposes of redesignation in accordance with section 107(d)(3)(E)(ii) and (v) of the CAA.

4. Maintenance Plan and Evaluation of Precursors

With regard to the redesignation of West Virginia, in evaluating the effect of the D.C. Circuit Court's remand of EPA's implementation rule, which included presumptions against consideration of VOC and ammonia as $PM_{2.5}$ precursors, EPA in this supplemental proposal is also considering the impact of the decision on the maintenance plan required under sections 175A and 107(d)(3)(E)(iv) of the CAA. To begin with, EPA notes that the Area has attained the 1997 annual $PM_{2.5}$ standard and that the State has shown that attainment of that standard is due to permanent and enforceable emission reductions.

In the December 11, 2012 NPR, EPA proposed to determine that the State's maintenance plan shows continued maintenance of the standard by tracking the levels of the precursors whose control brought about attainment of the 1997 annual $PM_{2.5}$ standard in the Wheeling Area. EPA therefore, believes that the only additional consideration related to the maintenance plan requirements that results from the D.C. Circuit Court's January 4, 2013 decision, is that of assessing the potential role of NH_3 and VOC in demonstrating continued maintenance in this Area. Based upon documentation provided by the State and supporting information, EPA believes that the maintenance plan for the Wheeling Area need not include any additional emission reductions of NH_3 or VOC in order to provide for continued maintenance of the standard.

First, as noted above in EPA's discussion of section 189(e), VOC emission levels in this Area have historically been well-controlled under SIP requirements related to ozone and other pollutants. Second, total NH_3 emissions throughout the Wheeling Area are very low, estimated to be less than 800 tons per year. *See* Table 2. This amount of NH_3 emissions appears especially small in comparison to the total amounts of SO_2, NO_X, and even direct $PM_{2.5}$ emissions from sources in the Area. Third, as described below, available information shows that no precursor, including NH_3 and VOC, is expected to increase over the maintenance period so as to interfere with or undermine the State's maintenance demonstration.

West Virginia's maintenance plan shows that emissions of direct $PM_{2.5}$, SO_2, and NO_X are projected to decrease by 2,529 tons per year (tpy), 35,616 tpy, and 20,581 tpy, respectively, over the maintenance period. *See* Table 1. In addition, emissions inventories used in the regulatory impact analysis (RIA) for the 2012 $PM_{2.5}$ NAAQS show that VOC and NH_3 emissions are projected to decrease by 2,209 tpy between 2007 and 2020. NH_3 emissions are projected to increase by 59 tpy between 2007 and 2020. *See* Table 2. Given that the Wheeling Area is already attaining the 1997 $PM_{2.5}$ NAAQS even with the current level of emissions from sources in the Area, the downward trend of emissions inventories would be consistent with continued attainment. Indeed, projected emissions reductions for the precursors that the State is addressing for purposes of the 1997 $PM_{2.5}$ NAAQS indicate that the Area should continue to attain the NAAQS following the precursor control strategy that the State has already elected to pursue.

Even if VOC and ammonia emissions were to increase unexpectedly between 2007 and 2020, the overall emissions reductions projected in direct $PM_{2.5}$, SO_2, and NO_X would be sufficient to offset any increases. For these reasons, EPA believes that local emissions of all of the potential $PM_{2.5}$ precursors will not increase to the extent that they will cause monitored $PM_{2.5}$ levels to violate the 1997 $PM_{2.5}$ standard during the maintenance period.

TABLE 1—COMPARISON OF 2008, 2015, 2022 SO_2, NO_X, AND DIRECT $PM_{2.5}$ EMISSION TOTALS IN TONS PER YEAR (TPY) FOR THE WHEELING NONATTAINMENT AREA

	SO_2	NO_X	$PM_{2.5}$
2008	67,103	35,971	6.001
2015	36,843	16,204	3,436

[9] *See, e.g.,* ''Approval and Promulgation of Implementation Plans for California—San Joaquin Valley PM_{10} Nonattainment Area; Serious Area Plan for Nonattainment of the 24-Hour and Annual PM_{10} Standards,'' 69 FR 30006 (May 26, 2004) (approving a PM_{10} attainment plan that imposes controls on direct PM_{10} and NO_X emissions and did not impose controls on SO_2, VOC, or ammonia emissions).

[10] *See, e.g., Assoc. of Irritated Residents* v. *EPA et al.,* 423 F.3d 989 (9th Cir. 2005).

TABLE 1—COMPARISON OF 2008, 2015, 2022 SO_2, NO_X, AND DIRECT $PM_{2.5}$ EMISSION TOTALS IN TONS PER YEAR (TPY) FOR THE WHEELING NONATTAINMENT AREA—Continued

	SO_2	NO_X	$PM_{2.5}$
2022	31,487	15,390	3,472
Decrease from 2008 to 2022	35,616	20,581	2,529

TABLE 2—COMPARISON OF 2007 AND 2020 VOC AND AMMONIA EMISSION TOTALS BY SOURCE SECTOR (TPY) FOR THE WHEELING NONATTAINMENT AREA [11]

Sector	VOC			NH_3		
	2007	2020	Net change 2007–2020	2007	2020	Net change 2007–2020
Point	396	402	6	89	186	97
Area	1,686	1,651	−35	532	538	6
Nonroad	999	514	−485	1	1	0
On-road	2,469	774	−1,695	86	42	−44
Fires	70	70	0	5	5	0
Total	5,621	3,412	−2,209	713	772	59

In addition, available air quality modeling analyses show continued maintenance of the standard during the maintenance period. The current air quality design value for the Area is 13.0 micrograms per cubic meter (μg/m³) (based on 2009–2011 air quality data), which is well below the 1997 annual $PM_{2.5}$ NAAQS of 15 μg/m³. Moreover, the modeling analysis conducted for the RIA for the 2012 $PM_{2.5}$ indicates that the design value for this Area is expected to continue to decline through 2020. In the RIA analysis, the 2020 modeled design value for the Wheeling Area is 8.4 μg/m³. Given that precursor emissions are projected to decrease through 2020, it is reasonable to conclude that monitored $PM_{2.5}$ levels in this Area will also continue to decrease in 2020.

Thus, EPA believes that there is ample justification to conclude that the Wheeling Area should be redesignated, even taking into consideration the emissions of other precursors potentially relevant to $PM_{2.5}$. After consideration of the D.C. Circuit Court's January 4, 2013 decision, and for the reasons set forth in this supplemental notice, EPA continues to propose approval of West Virginia's maintenance plan and its request to redesignate the Wheeling Area to attainment for the 1997 annual $PM_{2.5}$ standard.

[11] These emissions estimates were taken from the emissions inventories developed for the RIA for the 2012 $PM_{2.5}$ NAAQS. NH_3 increases are due to some (~5%) increase in fertilizer application, but mostly from EGU, and with huge SO_2 (point) reductions (88,229 in 2007 and 14,285 in 2020) would offset any increases.

III. Ammonia and Volatile Organic Compound Comprehensive Emissions Inventory

EPA in this proposal also addresses the State's submission that provides additional information concerning NH_3 and VOC emissions in the area in order to meet the emissions inventory requirement of section 172(c)(3) of the CAA. Section 172(c)(3) of the CAA requires states to submit a comprehensive, accurate, and current emissions inventory for the attainment area. For purposes of the $PM_{2.5}$ NAAQS, this emissions inventory should address not only direct emissions of $PM_{2.5}$, but also emissions of all precursors with the potential to participate in $PM_{2.5}$ formation, i.e., SO_2, NO_X, VOC and NH_3.

In the December 11, 2012 NPR (77 FR 73575), EPA proposed to approve the emissions inventory information requirement for the Wheeling Area. On June 24, 2013, West Virginia supplemented its submittal with the 2008 emission inventories for NH_3 and VOC. The additional emission inventories information provided by the State addresses emissions of NH_3 and VOC from the general source categories of point sources, area sources, onroad mobile sources, and nonroad sources. *See* Table 3. The state-submitted inventories were based on the data that West Virginia certified and submitted to the 2008 National Emissions Inventory (NEI) that is available at *http://www.epa.gov/ttn/chief/net/2008inventory.html.* The NEI is a comprehensive and detailed estimate of air emissions of both criteria and hazardous air pollutants from all air emissions sources. The NEI is prepared every three years by EPA based primarily upon emission estimates and emission model inputs provided by State, Local and Tribal air agencies.

The NEI point data category contains emission estimates for sources that are individually inventory and located at a fixed, stationary location. Point sources include large industrial facilities and electric power plants. The NEI nonpoint data category contains emissions estimates for sources which individually are too small in magnitude or too numerous to inventory as individual point sources. The NEI onroad and nonroad data categories contain mobile sources which are estimated for the 2008 NEI version 3 via the MOVES2010b and NONROAD models, respectively. NONROAD was run within the National Mobile Inventory Model (NMIM).

TABLE 3—MARSHALL COUNTY, WHEELING AREA NH_3 AND VOC EMISSIONS (TPY) BY SOURCE SECTOR

Sector	NH_3	VOC
Point	31.85	320.50
Area	78.90	2,944.99
Nonroad	0.12	163.45
Onroad	10.36	269.32
Total	121.23	3, 698.26

EPA has concluded that the 2008 NH_3 and VOC emissions inventories provided by the State are complete and as accurate as possible given the input data available for the relevant categories. EPA also believes that these inventories provide information about NH_3 and VOC as $PM_{2.5}$ precursors in the context of evaluating redesignation of the Wheeling Area under subpart 4. Therefore, EPA is proposing to approve the NH_3 and VOC emissions inventories submitted by the State, in conjunction with the NOx, direct $PM_{2.5}$, and SO_2 emissions inventories that EPA previously proposed to approve as fully meeting the comprehensive inventory requirement of section 172(c)(3) of the CAA for the Wheeling Area for the 1997 annual $PM_{2.5}$ standard. *See* (77 FR 7357, December 11, 2012). Since EPA's prior proposal addressed other precursor emissions inventories, EPA in this supplemental proposal is seeking comment only with respect to the additional inventories for NH_3 and VOC that West Virginia has submitted.

IV. Proposed Action

After fully considering the D.C. Circuit Court's decision in *NRDC* v. *EPA* on EPA's 1997 $PM_{2.5}$ Implementation rule, EPA in this supplemental notice is proposing to proceed with approval of the request to redesignate the Wheeling Area to attainment for the 1997 annual $PM_{2.5}$ NAAQS and the associated maintenance plan. EPA in this supplemental notice is also proposing to approve the 2008 NH_3 and VOC emissions inventory as meeting, in conjunction with the direct $PM_{2.5}$, NO_X and SO_2 emissions inventory that EPA previously proposed to approve, the comprehensive emissions inventory requirements of section 172(c)(3) of the CAA. In addition, EPA in this supplemental action is proposing to proceed with the approval of the insignificance determination of the onroad motor vehicle contribution of $PM_{2.5}$, NO_X and SO_2. EPA is seeking comment only on the issues raised in its supplemental proposal, and is not re-opening comment on other issues addressed in its prior proposal.

V. Statutory and Executive Order Reviews

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

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

In addition, this proposed rule pertaining to the redesignation of the West Virginia portion of the Wheeling WV–OH 1997 annual $PM_{2.5}$ nonattainment area, 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.

List of Subjects in 40 CFR Parts 52 and 81

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: July 8, 2013.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2013–17704 Filed 7–23–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R09–OAR–2012–0877; FRL–9837–6]

Approval and Promulgation of Implementation Plans; Designation of Areas for Air Quality Planning Purposes; State of California; PM_{10}; Redesignation of Sacramento to Attainment; Approval of PM_{10} Redesignation Request and Maintenance Plan for Sacramento

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve, as a revision of the California state implementation plan, the State's request to redesignate the Sacramento nonattainment area to attainment for the 24-hour particulate matter of ten microns or less (PM_{10}) National Ambient Air Quality Standard (NAAQS). EPA is also proposing to approve the PM_{10} maintenance plan and the associated motor vehicle emissions budgets for use in transportation conformity determinations necessary for the Sacramento area. Finally, EPA is proposing to approve the attainment year emissions inventory. EPA is proposing these actions because the SIP revision meets the requirements of the Clean Air Act and EPA guidance for such plans and motor vehicle emissions budgets.

DATES: Comments must be received on or before August 23, 2013.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R09–OAR–2012–0877, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: ungvarsky.john@epa.gov.*
3. *Mail or deliver:* John Ungvarsky (AIR–2), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901. Deliveries are only accepted during the Regional Office's normal hours of operation.

Instructions: All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or email. *http://www.regulations.gov* is an anonymous access system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. 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.

Docket: The index to the docket and documents in the docket for this action are generally 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:

Table of Contents

I. Summary of Today's Proposed Action

Under Clean Air Act (CAA or ''the Act'') section 107(d)(3)(D), EPA is proposing to approve the State's request to redesignate the Sacramento PM_{10} nonattainment area to attainment for the 24-hour PM_{10} National Ambient Air Quality Standard (NAAQS or ''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): (1) That the area has attained the 24-hour PM_{10} NAAQS in the 2010–2012 time period and that the area continues to attain the PM_{10} standard since that time; (2) that relevant portions of the California state implementation plan (SIP) are fully approved; (3) that the improvement in air quality is due to permanent and enforceable reductions in emissions; (4) that California has met all requirements applicable to the Sacramento PM_{10} nonattainment area with respect to section 110 and part D of the CAA; and (5) that the *PM_{10} Implementation/ Maintenance Plan and Redesignation Request for Sacramento County* (October 28, 2010) (''Sacramento PM_{10} Maintenance Plan'' or ''Plan'') [1] meets the requirements of section 175A of the CAA.

In addition, under CAA section 110(k)(3), EPA is proposing to approve the maintenance plan including the motor vehicle emissions budgets (MVEBs) in the 2008 Sacramento PM_{10} Plan as a revision to the California SIP because we find the MVEBs meet the applicable transportation conformity requirements under 40 CFR 93.118(e). EPA finds that the maintenance demonstration shows how the area will continue to attain the 24-hour PM_{10} NAAQS for at least 10 years beyond redesignation (i.e., through 2023) and that the contingency provisions describing the actions that the Sacramento Metropolitan Air Quality Management District (SMAQMD) 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. Finally, EPA is proposing to approve the attainment year emissions inventory under CAA section 172(c)(3).

EPA is proposing these actions because the SIP revision meets the requirements of the CAA and EPA guidance for such plans and budgets.

II. Background

A. The PM_{10} NAAQS

EPA sets the NAAQS for certain ambient air pollutants at levels required to protect public health and welfare. Particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers, or PM_{10}, is one of these ambient air pollutants for which EPA has established health-based standards.

EPA revised the NAAQS for particulate matter on July 1, 1987 (52 FR 24633), replacing standards for total suspended particulates (TSP less than 30 microns in diameter) with new standards applying only to particulate matter up to 10 microns in diameter (PM_{10}). At that time, EPA established two PM_{10} standards, an annual standard and a 24-hour standard.

In an October 17, 2006 p.m. NAAQS revision, the 24-hour PM_{10} standards were retained but the annual standards were revoked effective December 18, 2006. 71 FR 61144 (October 17, 2006). On January 15, 2013, EPA announced that it was again retaining the 24-hour PM_{10} NAAQS as a 24-hour standard of 150 micrograms per cubic meter (ug/ m^3). See 78 FR 3086. This SIP submittal addresses the 24-hour PM_{10} standard as originally promulgated in 1987 and reaffirmed on January 15, 2013. An area attains the 24-hour PM_{10} standard of 150 micrograms per cubic meter (ug/m^3) when the expected number of days per calendar year with a 24-hour concentration in excess of the standard (referred to as an exceedance), is equal to or less than one.[2]

B. PM_{10} Planning Requirements

Effective January 20, 1994, EPA designated Sacramento County as a moderate nonattainment area for the PM_{10} NAAQS. See 58 FR 67334 (December, 21, 1993). The designation, classification, and boundaries of the Sacramento nonattainment area are codified at 40 CFR 81.305.

[1] See letter, James N. Goldstene, Executive Officer, to Jared Blumenfeld, Regional Administrator, EPA Region 9, dated December 7, 2010, with attachments.

[2] An exceedance is defined as a daily value that is above the level of the 24-hour standard, 150 μg/ m^3, after rounding to the nearest 10 μg/m^3 (i.e., values ending in five or greater are to be rounded up). Thus, a recorded value of 154 μg/m^3 would not be an exceedance since it would be rounded to 150 μg/m^3; whereas, a recorded value of 155 μg/m^3 would be an exceedance since it would be rounded to 160 μg/m^3. See 40 CFR part 50, Appendix K, section 1.0.

Beginning in the 1970's and continuing to the present, the SMAQMD[3] and CARB have adopted a number of rules and prepared a number of nonattainment plans to address planning requirements under the CAA, as amended in 1977. CARB submitted these rules and plans to EPA at various times, and EPA approved a number of them into the California SIP. Examples of rules adopted by SMAQMD and approved by EPA as revisions to the California SIP as part of the PM_{10} control strategy in the Sacramento PM_{10} nonattainment area include: Rule 403—Fugitive Dust; Rule 405—Dust and Condensed Fumes; Rule 412—Stationary Source Internal Combustion Engines at Major Stationary Sources of NO_X; and Rule 414—Natural Gas Fired Water Heaters. Examples of rules adopted by CARB and approved by EPA as revisions to the California SIP that have reduced PM_{10} in the Sacramento PM_{10} nonattainment area include: California Code of Regulations (CCR) Title 13, Section 1956.8—Heavy Duty Vehicle Exhaust Emission Standards; CCR, Section 2262—California Reformulated Gasoline Phase 2 and Phase 3 Standards; and CCR, Sections 2420–2427—Heavy Duty Diesel Cycle Engines.

On February 15, 2002, EPA determined under section 179(c) of the CAA that the Sacramento PM_{10} nonattainment area had attained the 24-hour PM_{10} NAAQS by its December 31, 2000 attainment date, based on complete, quality-assured, and certified ambient air monitoring data that showed the area monitored attainment of the 24-hour PM_{10} NAAQS for 1998–2000. (67 FR 7082). Because EPA determined that the Sacramento PM_{10} nonattainment area met its attainment date, no PM_{10} serious nonattainment area requirements apply in the Sacramento PM_{10} nonattainment area. In this action, we are updating the determination of attainment to account for PM_{10} monitoring data since 2001, including more recent years consistent with the applicable criterion for redesignation under CAA section 107(d)(3)(E)(i).

On December 7, 2010, CARB submitted the Sacramento PM_{10} Maintenance Plan and requested that EPA redesignate the Sacramento PM_{10} nonattainment area to attainment for the 24-hour PM_{10} NAAQS. We are proposing action today on CARB's December 7, 2010 submittal, including the Sacramento PM_{10} Maintenance Plan and redesignation request.

[3] In 1990, the Sacramento County Air Pollution Control District changed its name to the Sacramento Metropolitan Air Quality Management District.

III. Procedural Requirements for Adoption and Submittal of SIP Revisions

Sections 110(a)(1) and 110(l) of the Act require states to provide reasonable notice and public hearing prior to adoption of SIP revisions. In this action, we are proposing action on CARB's December 7, 2010 submittal of the Sacramento PM_{10} Maintenance Plan, dated October 28, 2010, as a revision to the California SIP. The submittal documents the public review process followed by SMAQMD and CARB in adopting the Sacramento PM_{10} Maintenance Plan prior to submittal to EPA as a revision to the California SIP. The documentation provides evidence that reasonable notice of a public hearing was provided to the public and that a public hearing was conducted prior to adoption.

CARB's submittal includes a letter dated October 28, 2010 from Larry Greene, Executive Director/Air Pollution Control Officer to the Board of Directors for the SMAQMD. In addition, Enclosure 1, Attachment 3 of CARB's submittal includes a copy of the notice to the public published on September 27, 2010, announcing a public hearing to be held on October 28, 2010. These materials document the public review process followed by SMAQMD in adopting the Sacramento PM_{10} Maintenance Plan prior to transmittal to CARB and provide evidence that reasonable notice of a public hearing was provided to the public and that a public hearing was conducted prior to adoption. Specifically, the notice for the Board hearing was published in the Sacramento Bee, a newspaper of general circulation, on September 27, 2010 and sent to over 2000 email addresses. The Sacramento PM_{10} Maintenance Plan was also made available for viewing on the District's Web site and at the District office on and after September 27, 2010.

Enclosure I, Attachment 1 of CARB's submittal documents the adoption of the Sacramento PM_{10} Plan by the SMAQMD Board of Directors. On October 28, 2010, the SMAQMD Board of Directors approved the Sacramento PM_{10} Maintenance Plan and directed SMAQMD staff to forward the Plan to CARB, the Governor of California's designee for SIP matters.

Enclosure IV of CARB's submittal documents CARB's board resolution regarding the Sacramento PM_{10} Plan. On December 7, 2010, CARB submitted the Sacramento PM_{10} Maintenance Plan to EPA for approval as a revision to the California SIP.

Based on the documentation included in CARB's submittal, we find that the submittal of the Sacramento PM_{10} Maintenance Plan as a SIP revision satisfies the procedural requirements of sections 110(l) of the Act for revising SIPs.

CAA section 110(k)(1)(B) requires EPA to determine whether a SIP submittal is complete within 60 days of receipt. This section also provides that any plan that we have not affirmatively determined to be complete or incomplete will become complete six months after the day of submittal by operation of law. A completeness review allows us to determine if the submittal includes all the necessary items and information we need to act on it.

We make completeness determinations using criteria we have established in 40 CFR part 51, Appendix V. These criteria fall into two categories: administrative information and technical support information. The administrative information provides documentation that the State has followed basic administrative procedures during the SIP-adoption process and thus we have a legally-adopted SIP revision in front of us. The technical support information provides us the information we need to determine the impact of the proposed revision on attainment and maintenance of the air quality standards.

We notify a state of our completeness determination by letter unless the submittal becomes complete by operation of law. A finding of completeness does not approve the submittal as part of the SIP nor does it indicate that the submittal is approvable. It does start a 12-month clock for EPA to act on the SIP submittal. See CAA section 110(k)(2). The Sacramento PM_{10} Maintenance Plan became complete by operation of law on June 7, 2011.

IV. Substantive Requirements for Redesignation

The CAA establishes the requirements for redesignation of a nonattainment area to attainment. Specifically, section 107(d)(3)(E) allows for redesignation provided that the following criteria are met: (1) EPA determines that the area has attained the applicable NAAQS; (2) EPA has fully approved the applicable implementation plan for the area under section 110(k); (3) EPA determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP, applicable federal air pollution control regulations, and other permanent and enforceable reductions; (4) EPA has fully approved a maintenance plan for the area as meeting the requirements of CAA section 175A; and (5) the State containing such area has met all requirements applicable to the area under section 110 and part D of the CAA.

EPA provided guidance on redesignations in a document entitled, ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' published in the **Federal Register** on April 16, 1992 (57 FR 13498), and supplemented on April 28, 1992 (57 FR 18070) (referred to herein as the ''General Preamble''). Other relevant EPA guidance documents include: ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, EPA Office of Air Quality Planning and Standards, September 4, 1992 (referred to herein as the ''Calcagni memorandum''); ''Part D New Source Review (part D NSR) Requirements for Areas Requesting Redesignation to Attainment,'' Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994 (Nichols memorandum); and ''State Implementation Plans for Serious PM_{10} Nonattainment Areas, and Attainment Date Waivers for PM_{10} Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of title I of the Clean Air Act Amendments of 1990,'' 59 FR 41998 (August 16, 1994) (PM_{10} Addendum).

In this proposed rulemaking action, EPA applies these policies to the Sacramento PM_{10} Maintenance Plan, taking into consideration the specific factual issues presented. For the reasons set forth below in section V of this document, we propose to approve CARB's request for redesignation of the Sacramento PM_{10} nonattainment area to attainment for the 24-hour PM_{10} NAAQS based on our conclusion that all of the criteria under CAA section 107(d)(3)(E) have been satisfied.

V. Evaluation of the State's Redesignation Request for the Sacramento PM_{10} Nonattainment Area

A. Determination That the Area Has Attained the PM_{10} NAAQS

CAA section 107(d)(3)(E)(i) states that for an area to be redesignated to attainment, EPA must determine that the area has attained the relevant NAAQS. In this case, the relevant NAAQS is the 24-hour PM_{10} NAAQS.

Generally, EPA determines whether an area's air quality is meeting the 24-hour PM_{10} NAAQS based upon complete,[4] quality-assured, and certified data gathered at established state and local air monitoring stations (SLAMS) in the nonattainment area and entered into the EPA Air Quality System (AQS) database. Data from air monitors operated by state, local, or tribal agencies in compliance with EPA monitoring requirements must be submitted to AQS. These monitoring agencies certify annually that these data are accurate to the best of their knowledge. Accordingly, EPA relies primarily on data in AQS when determining the attainment status of an area. See 40 CFR 50.6; 40 CFR part 50, appendices J and K; 40 CFR part 53; and, 40 CFR part 58, appendices A, C, D, and E.[5] EPA will also consider air quality data from other air monitoring stations in the nonattainment area provided those stations meet the federal monitoring requirements for SLAMS, including the quality assurance and quality control criteria in 40 CFR part 58, appendix A. See 40 CFR 58.14 (2006) and 58.20 (2007);[6] 71 FR 61236, 61242; (October 17, 2006). All valid data are reviewed to determine the area's air quality status in accordance with 40 CFR part 50, appendix K.

Attainment of the 24-hour PM_{10} standard is determined by calculating the expected number of exceedances of the standard in a year. The 24-hour PM_{10} standard is attained when the expected number of exceedances averaged over a three-year period is less than or equal to one at each monitoring site within the nonattainment area. Generally, three consecutive years of air quality data are required to show attainment of the 24-hour PM_{10} standard. See 40 CFR part 50 and appendix K.

To demonstrate attainment of the 24-hour PM_{10} standard at a monitoring site, the monitor must provide sufficient data to perform the required calculations in 40 CFR part 50, appendix K. The amount of data required varies with the sampling frequency, data capture rate, and the number of years of record. For PM_{10}, a ''complete'' set of data includes a minimum of 75 percent of the scheduled PM_{10} samples per quarter. See 40 CFR part 50, appendix K, section 2.3(a). In all cases, three years of representative monitoring data that meet the 75 percent criterion should be utilized, if available. More than three years may be considered if all additional representative years of data meeting the 75 percent criterion are utilized. Data not meeting these criteria may also suffice to show attainment; however, such exceptions must be approved by the appropriate Regional Administrator in accordance with EPA guidance. See 40 CFR part 50, appendix K, section 2.3.

In the Sacramento PM_{10} nonattainment area, the agencies responsible for assuring that the area meets air quality monitoring requirements include CARB and SMAQMD. Both CARB and SMAQMD submit annual monitoring network plans to EPA. SMAQMD network plans describe the monitoring network operated by SMAQMD and CARB in Sacramento County, and CARB's network plans describe the monitoring sites CARB operates. These plans discuss the status of the air monitoring network, as required under 40 CFR 58.10.

EPA regularly reviews these annual plans for compliance with the applicable reporting requirements in 40 CFR part 58. With respect to PM_{10}, EPA has found that the area's network plans, submitted by CARB and SMAQMD, meet the applicable requirements under 40 CFR part 58. See EPA letters to CARB and SMAQMD approving their annual network plans for years 2010, 2011, and 2012.[7] [8] EPA also concluded from its

[4] For PM_{10}, a complete set of data includes a minimum of 75 percent of the scheduled PM_{10} samples per quarter. See 40 CFR part 50, Appendix K, section 2.3(a).

[5] Because the annual PM_{10} standard was revoked effective December 18, 2006, this document discusses only attainment of the 24-hour PM_{10} standard. See 71 FR 61144; (October 17, 2006).

[6] EPA promulgated amendments to the ambient air monitoring regulations in 40 CFR parts 53 and 58 on October 17, 2006. (See 71 FR 61236.) The requirements for Special Purpose Monitors were revised and moved from 40 CFR 58.14 to 40 CFR 58.20.

[7] Letter from Matthew Lakin, Manager, Air Quality Analysis Office, U.S. EPA Region IX, to Karen Magliano, Chief, Air Quality Data Branch, Planning and Technical Support Division, CARB (October 29, 2010) (approving CARB's ''2010 Annual Monitoring Network Plan for the Small Districts in California''); Letter from Matthew Lakin, Manager, Air Quality Analysis Office, U.S. EPA Region IX, to Karen Magliano, Chief, Air Quality Data Branch, Planning and Technical Support Division, CARB (November 1, 2011) (approving CARB's ''2011 Annual Monitoring Network Plan for the Small Districts in California''); Letter from Matthew Lakin, Manager, Air Quality Analysis Office, U.S. EPA Region IX, to Karen Magliano, Chief, Air Quality Data Branch, Planning and Technical Support Division, CARB (April 19, 2013) (approving CARB's ''2012 Annual Monitoring Report for the Small Districts in California'').

[8] Letter from Matthew Lakin, Manager, Air Quality Analysis Office, U.S. EPA Region IX, to Larry Greene, Air Pollution Control Officer, SMAQMD (November 1, 2010) (approving the ''Sacramento Metropolitan Air Quality Management District's 2010 Annual Monitoring Network Plan''); Letter from Matthew Lakin, Manager, Air Quality Analysis Office, U.S. EPA Region IX, to Larry Greene, Air Pollution Control Officer, SMAQMD

Continued

Technical System Audit of the CARB Primary Quality Assurance Organization (PQAO) (conducted during the summer of 2011), that the combined ambient air monitoring network operated by CARB and the local air districts in their PQAO (which includes SMAQMD) currently meets or exceeds the requirements for the minimum number of SLAMS for PM_{10} in the Sacramento nonattainment area.[9] CARB annually certifies that the data it submits to AQS are complete and quality-assured.[10]

There are two types of PM_{10} monitors used throughout the Sacramento PM_{10} nonattainment area monitoring network: the Federal Reference Method (FRM) filter-based high-volume size-selective inlet sampler (hi-vols or SSI), and the Federal Equivalent Method (FEM) tapered element oscillating microbalance (TEOM), which measures PM_{10} on a continuous basis. The schedule for PM_{10} sample collection is one in six days for the FRM filter-based high volume samplers, while the FEM TEOM monitors operate on a daily 24-hour schedule.

There were six PM_{10} monitoring sites within the Sacramento PM_{10} nonattainment area in calendar years 2010, 2011, and 2012. SMAQMD operates five of the monitoring sites: Goldenland Court, North Highlands, Del Paso Manor, Branch Center Rd #2, and Stockton Blvd. CARB operates the T Street monitoring site. FRM filter-based high-volume samplers are located at all of the six sites listed above. Del Paso Manor and the Stockton Blvd. utilize both the FRM filter-based samplers and FEM TEOM monitors.[11] EPA defines specific monitoring site types and spatial scales of representativeness to characterize the nature and location of required monitors. For the six sites, the spatial scale is neighborhood scale, and the monitoring objective is population exposure, except the T Street site, which has a monitoring objective of highest concentration.[12]

Consistent with the requirements contained in 40 CFR part 50, EPA has reviewed the quality-assured, and certified PM_{10} ambient air monitoring data as recorded in AQS for the applicable monitoring period collected at the monitoring sites in the Sacramento nonattainment area and determined that the data are complete.

Table 1 summarizes the site-specific highest 24-hour PM_{10} concentrations for the period of 2001–2012. As shown in Table 1, only one of the highest concentrations exceeded the 24-hour PM_{10} NAAQS standard of 150 μg/m³. Table 2 summarizes the expected number of exceedances occurring over three-year periods dating back to EPA's previous clean data determination. See 67 FR 7082 (February 15, 2002). The 24-hour PM_{10} standard is attained when the expected number of exceedances averaged over a three-year period is less than or equal to one at each monitoring site within the nonattainment area. The highest value in Table 2 is 0.3 exceedances over a three-year period, and the Sacramento PM_{10} nonattainment area did not violate the 24-hour PM_{10} NAAQS during the 2001–2012 period. Therefore, we are proposing to determine, based on the complete, quality-assured data for three most recent years (2010–2012) that the Sacramento PM_{10} nonattainment area has attained the 24-hour PM_{10} standard. There are six PM_{10} monitors currently operating in the nonattainment area. Preliminary SLAMS data for 2013 from these monitors are also consistent with continued attainment.

TABLE 1—SUMMARY OF HIGHEST 24-HOUR PM_{10} CONCENTRATIONS (μg/m3) FROM AMBIENT DATA COLLECTED WITHIN THE SACRAMENTO PM_{10} NONATTAINMENT AREA, 2001–2012.[a]

Site	AQS Monitor ID	Highest concentration (μg/m³)											
		2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
North Highlands-Blackfoot	06–067–0002–1	64	53	62	44	110	65	56	97	33	48	65	34
Sacramento-Del Paso Manor	06–067–0006–1	68	86	53	38	71	63	70	71	45	44	62	41
	06–067–0006–3	65	43	43	101	49	132	66	92	39	19	NA	NA
Branch Center Road #1[b]	06–067–0283–1	78	77	75	45	61	38	NA	NA	NA	NA	NA	NA
Branch Center Road #2[b]	06–067–0284–1	NA	NA	NA	NA	NA	81	56	89	76	62	69	60
Sacramento-Airport Road[c]	06–067–0013–1	73	144	NA	35	56	90	94	71	NA	NA	NA	NA
	06–067–0013–2	51	73	57	47	NA	NA	NA	NA	NA	NA	NA	NA
Sacramento Health Dept.-Stockton Blvd	06–067–4001–2	58	85	53	44	64	56	56	88	45	45	60	34
	06–067–4001–3	122	103	73	91	70	159	51	92	44	50	73	37
Sacramento-Goldenland Court[c]	06–067–0014–1	NA	NA	NA	NA	NA	NA	NA	56	48	42	63	32
	06–067–0014–3	NA	NA	NA	NA	NA	NA	NA	NA	NA	55	69	76
Sacramento-T Street	06–067–0010–1	89	77	65	58	53	109	53	73	47	53	38	36
	06–067–0010–2	73	86	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
	06–067–0010–3	48	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA

[a] The data in this table are from AQS QuickLook Reports dated January 10, 2013 and June 7, 2013.

[b] The Branch Center Road #1 monitor was replaced by the Branch Center Road #2 monitor, located .25 mi to the north, in early 2006.

[c] The Airport Road site was relocated to the Goldenland Court site in August 2008.

NA: data are not available.

(October 31, 2011) (approving the ''Sacramento Metropolitan Air Quality Management District's 2011 Annual Monitoring Network Plan''); Letter from Matthew Lakin, Manager, Air Quality Analysis Office, U.S. EPA Region IX, to Larry Greene, Air Pollution Control Officer, SMAQMD (March 1, 2013) (approving the ''Sacramento Metropolitan Air Quality Management District's 2012 Annual Monitoring Network Plan'').

[9] See letter from Deborah Jordan, Director, Air Division, U.S. EPA Region IX, to James Goldstene, Executive Officer, CARB, transmitting ''System Audit of the Ambient Monitoring Program: California Resources Board, June–September: 2011,'' with enclosure, October 22, 2012.

[10] See, e.g., letter from Sylvia Vanderspek, Chief, Air Quality Data Branch, Planning and Technical Support Division, CARB, to Jared Blumenfeld, Regional Administrator, U.S. EPA Region IX, certifying calendar year 2012 ambient air quality data and quality assurance data, May 16, 2013.

[11] A map of the locations of Sacramento County monitoring stations is found in Figure 3.2 of the Sacramento PM_{10} Plan.

[12] See footnotes 7 and 8.

TABLE 2—SUMMARY OF EXPECTED EXCEEDANCES 3-YR AVERAGE FROM AMBIENT DATA COLLECTED WITHIN THE SACRAMENTO PM_{10} NONATTAINMENT AREA, 2001–2012.[A]

Site name	Site (AQS Monitor ID)	Expected Exceedances 3-yr Average											
		1999–2001	2000–2002	2001–2003	2002–2004	2003–2005	2004–2006	2005–2007	2006–2008	2007–2009	2008–2010	2009–2011	2010–2012
North Highlands-Blackfoot	06–067–0002–1	0	0	0	0	0	0	0	0	0	0	0	0
Sacramento-Del Paso Manor	06–067–0006–1	0	0	0	0	0	0	0	0	0	0	0	0
	06–067–0006–3	0	0	0	0	0	0	0	0	0	0	0	0
Branch Center Road #1[b]	06–067–0283–1	0	0	0	0	0	0	0	0	NA	NA	NA	NA
Branch Center Road #2[b]	06–067–0284–1	NA	NA	NA	NA	NA	NA	0	0	0	0	0	0
Sacramento-Airport Road[c]	06–067–0013–1	0	0	0	0	0	0	0	0	0	0	NA	NA
	06–067–0013–2	0	0	0	0	0	0	NA	NA	NA	NA	NA	NA
Sacramento Health Dept.-Stockton Blvd	06–067–4001–2	0	0	0	0	0	0	0	0	0	0	0	0
	06–067–4001–3	0	0	0	0	0	0.3	0.3	0.3	0	0	0	0
Sacramento-Goldenland Court[c]	06–067–0014–1	NA	NA	NA	NA	NA	NA	NA	0	0	0	0	0
	06–067–0014–3	NA	NA	NA	NA	NA	NA	NA	NA	NA	0	0	0
Sacramento-T Street	06–067–0010–1	0	0	0	0	0	0	0	0	0	0	0	0
	06–067–0010–2	0	0	0	0	0	NA	NA	NA	NA	NA	NA	NA
	06–067–0010–3	0	0	0	0	NA	NA	NA	NA	NA	NA	NA	NA

[a] The data in this table are from AQS QuickLook Reports dated January 10, 2013 and June 7, 2013.
[b] The Branch Center Road #1 monitor was replaced by the Branch Center Road #2 monitor, located .25 mi to the north, in early 2006.
[c] The Airport Road site was relocated to the Goldenland Court site in August 2008.
NA: data are not available.

B. The Area Must Have a Fully Approved SIP Meeting Requirements Applicable for Purposes of Redesignation Under Clean Air Act Section 110 and Part D

Section 107(d)(3)(E)(ii) and (v) require EPA to determine that the area has a fully approved applicable SIP under section 110(k) that meets all applicable requirements under section 110 and part D for the purposes of redesignation.

1. Basic SIP Requirements Under Section 110

The general SIP elements and requirements set forth in section 110(a)(2) include, but are not limited to, the following: submittal of a SIP that has been adopted by the State after reasonable public notice and hearing; provisions for establishment and operation of appropriate procedures needed to monitor ambient air quality; implementation of a source permit program; provision for the implementation of part C requirements for prevention of significant deterioration (PSD) provisions; provisions for the implementation of part D requirements for nonattainment new source review (nonattainment NSR) NSR permit programs; provisions for air pollution modeling; and provisions for public and local agency participation in planning and emission control rule development.

We note that SIPs must be fully approved only with respect to applicable requirements for purposes of redesignation in accordance with section 107(d)(3)(E)(ii). The section 110 (and part D) requirements that are linked to a particular nonattainment area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. Requirements that apply regardless of the designation of any particular area on the State are not applicable requirements for the purposes of redesignation, and the State will remain subject to these requirements after the Sacramento PM_{10} nonattainment area is redesignated to attainment.

For example, CAA section 110(a)(2)(D) requires that SIPs contain certain measures to prevent sources in a state from significantly contributing to air quality problems in another state, known as ''transport SIPs.'' Because the section 110(a)(2)(D) requirements for transport SIPs are not linked to a particular nonattainment area's designation and classification but rather apply regardless of the attainment status, these are not applicable requirements for the purposes of redesignation under section 107(d)(3)(E).

Similarly, EPA believes that other section 110 (and part D) requirements that are not linked to nonattainment plan submissions or to an area's attainment status are not applicable requirements for purposes of redesignation. EPA believes that the section 110 (and part D) requirements that relate to a particular nonattainment area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. This view is consistent with EPA's existing policy on applicability of the conformity SIP requirement for redesignations. *See* discussion in 75 FR 36023, 36026 (June 24, 2010).

On numerous occasions, CARB and SMAQMD have submitted and we have approved provisions addressing the basic CAA section 110 provisions. The Sacramento portion of the California SIP [13] contains enforceable emission limitations; requires monitoring, compiling and analyzing of ambient air quality data; requires preconstruction review of new or modified stationary sources; provides for adequate funding,

[13] Sacramento's portion of the California SIP may be found at *http://yosemite.epa.gov/r9/r9sips.nsf/Casips?readform&count=100&state=California.*

staff, and associated resources necessary to implement its requirements; and provides the necessary assurances that the State maintains responsibility for ensuring that the CAA requirements are satisfied in the event that Sacramento is unable to meet its CAA obligations. There are no outstanding or disapproved applicable SIP submittals with respect to the Sacramento portion of the SIP that prevent redesignation of the Sacramento PM_{10} nonattainment area for the 24-hour PM_{10} standard. Therefore, we propose to conclude that CARB and SMAQMD have met all SIP requirements for Sacramento applicable for purposes of redesignation under section 110 of the CAA (General SIP Requirements).

2. SIP Requirements Under Part D

Subparts 1 and 4 of part D, title 1 of the CAA contain air quality planning requirements for PM_{10} nonattainment areas. Subpart 1 contains general requirements for all nonattainment areas of any pollutant, including PM_{10}, governed by a NAAQS. The subpart 1 requirements include, among other things, provisions for the reasonable available control measures (RACM), reasonable further progress (RFP), emissions inventories, contingency measures, and conformity. Subpart 4 contains specific planning and scheduling requirements for PM_{10} nonattainment areas. Section 189(a), (c), and (e) requirements apply specifically to moderate PM_{10} nonattainment areas and include: (1) An approved permit program for construction of new and modified major stationary sources; (2) provisions for RACM; (3) an attainment demonstration; (4) quantitative milestones demonstrating RFP toward attainment by the applicable attainment date; and (5) provisions to ensure that the control requirements applicable to major stationary sources of PM_{10} also apply to major stationary sources of PM_{10} precursors except where the Administrator has determined that such sources do not contribute significantly to PM_{10} levels that exceed the NAAQS in the area.

As noted above, in 2002, EPA determined that the Sacramento PM_{10} nonattainment area attained the 24-hour PM_{10} NAAQS based on 1998–2000 data. (67 FR 7082, February 15, 2002). In accordance with EPA's Clean Data Policy, we have determined that the following requirements do not apply to the State for so long as Sacramento continues to attain the PM_{10} standard or until the area is redesignated to attainment: an attainment demonstration under section 189(a)(1)(B); RACM provisions under sections 172(c) and 189(a)(1)(C); reasonable further progress provisions under section 189(c)(1); and contingency measures under section 172(c)(9). For other rulemaking actions applying the Clean Data Policy in the context of PM_{10}, see 77 FR 31271–72 (proposed Determination of Attainment for Paul Spur/Douglas, Arizona); 76 FR 10821–22 (proposed Determination of Attainment for Truckee Meadows, Nevada); 75 FR 13712–14 (proposed Determination of Attainment for Coso Junction, California); 75 FR 36027 (proposed Redesignation for Coso Junction, California); 73 FR 22313 (proposed Redesignation for San Joaquin Valley). *See also,* 40 CFR 51.918.

Moreover, in the context of evaluating the area's eligibility for redesignation, there is a separate and additional justification for finding that requirements associated with attainment are not applicable for purposes of redesignation. Prior to and independently of the Clean Data Policy, and specifically in the context of redesignations, EPA interpreted attainment-linked requirements as not applicable for purposes of redesignation. In the General Preamble, ''General Preamble for the Interpretation of Title I of the Clean Air Act Amendments of 1990,'' (General Preamble) 57 FR 13498, 13564 (April 16, 1992), EPA stated: [t]he section 172(c)(9) requirements are directed at ensuring RFP and attainment by the applicable date. These requirements no longer apply when an area has attained the standard and is eligible for redesignation. Furthermore, section 175A for maintenance plans * * * provides specific requirements for contingency measures that effectively supersede the requirements of section 172(c)(9) for these areas. *See also* Calcagni memorandum at 6 (''The requirements for reasonable further progress and other measures needed for attainment will not apply for redesignations because they only have meaning for areas not attaining the standard.''). Thus, even if the requirements associated with attainment had not previously been suspended, they would not apply for purposes of evaluating whether an area that has attained the standard qualifies for redesignation. EPA has enunciated this position since the General Preamble was published more than twenty years ago, and it represents the Agency's interpretation of what constitutes applicable requirements under section 107(d)(3)(E). The Courts have recognized the scope of EPA's authority to interpret ''applicable requirements'' in the redesignation context. *See Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir.2004).

The remaining applicable Part D requirements for moderate PM_{10} areas are: (1) An emission inventory under section 172(c) (3); (2) a permit program for the construction and operation of new and modified major stationary sources of PM_{10} under sections 172(c)(5) and 189(a)(1)(A); (3) control requirements for major stationary sources of PM_{10} precursors under section 189(e), except where the Administrator determines that such sources do not contribute significantly to PM_{10} levels that exceed the standard in the area; (4) requirements under section 172(c)(7) that meet the applicable provisions of section 110(a)(2); and (5) provisions to ensure that federally supported or funded projects conform to the air quality planning goals in the applicable SIP under section 176(c). We discuss each of these requirements below.

• Emissions Inventory

CAA section 172(c)(3) requires states to submit a comprehensive, accurate, current inventory of relevant PM_{10} pollutants for the baseline year from all sources within the nonattainment area. The inventory is to address direct and secondary PM_{10} emissions, and all stationary (generally referring to larger stationary source or ''point'' sources), area (generally referring to smaller stationary and fugitive sources), and mobile (on-road, nonroad, locomotive and aircraft) sources are to be included in the inventory. We interpret the Act such that the emission inventory requirements of section 172(c)(3) are satisfied by the inventory requirements of the maintenance plan. See 57 FR 13498, at 13564 (April 16, 1992). Thus, EPA is proposing to approve the attainment inventories submitted as part of the Sacramento PM_{10} Maintenance Plan as satisfying the requirements of sections 172(c)(3) for the purposes of redesignation of the Sacramento PM_{10} nonattainment area to attainment for the 24-hour PM_{10} NAAQS. The attainment inventories are described in V.D.1 of this notice.

• Permits for New and Modified Major Stationary Sources

CAA Sections 172(c)(5) and 189(a)(1)(A) require the State to submit SIP revisions that establish certain requirements for new or modified stationary sources in nonattainment areas, including provisions to ensure that major new sources or major modifications of existing sources of nonattainment pollutants incorporate the highest level of control, referred to as the Lowest Achievable Emission Rate (LAER), and that increases in emissions from such stationary sources are offset so as to provide for reasonable further progress towards attainment in the nonattainment area. The process for reviewing permit applications and issuing permits for new or modified stationary sources in nonattainment areas is referred to as ''nonattainment New Source Review'' (nonattainment NSR).

EPA has previously approved SMAQMD Rule 203 (Prevention of Significant Deterioration) and partially approved and partially disapproved SMAQMD Rule 214 (Federal New Source Review). 76 FR 43183 (July 20, 2011). Because of the partial disapproval, SMAQMD does not currently have a fully-approved nonattainment NSR program.

The NSR deficiencies identified in EPA's partial approval and partial disapproval of Rule 214 are limited to the following issues: (1) A small number of definitions: ''begin actual construction,'' ''federally enforceable,'' and ''necessary preconstruction approvals or permits''; (2) the rule is missing adequate public notice requirements for minor sources; (3) the rule is missing provisions meeting the requirements of 40 CFR 51.165(a)(5)(ii) and 40 CFR 51.307(b)(2); and (4) the rule contains a cross reference to Rule 207—Title V—Federal Operating Permit Program, which is not SIP approved. The limited disapproval triggered an obligation on EPA to promulgate a federal implementation plan (FIP) to remedy the NSR deficiencies by August 19, 2013. See 76 FR 43184 (July 20, 2011). To correct the deficiencies, on September 26, 2012, CARB submitted amended SMAQMD Rule 214 for inclusion in the SIP. On February 14, 2013, a notice of proposed rulemaking to approve revised Rule 214 was published in the **Federal Register**. See 78 FR 10589. On April 25, 2013, Regional Administrator Jared Blumenfeld signed a notice of final rulemaking to approve revised Rule 214. It is currently awaiting publication in the **Federal Register**. If the final rulemaking for revised Rule 214 becomes effective prior to EPA finalizing the area's redesignation to attainment for PM_{10}, the 172(c)(5) and 189(a(1)(A) requirements would be fulfilled prior to redesignation.

If EPA does not approve revised Rule 214 prior to EPA finalizing the area's redesignation to attainment for PM_{10}, it would not affect EPA approval of the redesignation request because upon redesignation the requirements of SMAQMD's PSD program would apply to PM_{10} and PM_{10} precursor emissions of new major sources or major modifications. Thus, new major sources with significant PM_{10} emissions and major modifications of PM_{10} at major sources as defined under 40 CFR 51.21 will be required to obtain a PSD permit or include PM_{10} emissions in their existing PSD permit. Since PSD requirements [14] will apply after redesignation, an area being redesignated to attainment need not comply with the requirement that a nonattainment NSR program be approved prior to redesignation as long as the state demonstrates maintenance of the NAAQS in the area without implementation of nonattainment NSR. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, titled ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.'' *See also,* redesignation rulemakings for Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); and, Grand Rapids, Michigan (61 FR 31834–31837, June 21, 1996).

Based on our review of the Sacramento PM_{10} Maintenance Plan, we conclude that the maintenance demonstration does not rely on implementation of nonattainment NSR because the Plan applies standard growth factors to stationary source emissions and does not rely on NSR offsets to reduce the rate of increase in emissions over time from point sources.[15] In addition, the PM_{10} Maintenance Plan adds emission reduction credits (ERCs) for PM_{10}, NO_X, and SO_x to future projected emissions to ensure that the use of ERCs will not be inconsistent with the future PM_{10} maintenance goals. Therefore, EPA concludes that a fully-approved nonattainment NSR program is not necessary for approval of the State's redesignation request for the Sacramento PM_{10} nonattainment area.

We conclude that Sacramento's portion of the California SIP adequately meets the requirements of section 172(c)(5) and 189(a)(1)(A) for purposes of this redesignation.

[14] PSD requirements control the growth of new source emissions in areas designated as attainment for a NAAQS.

[15] See letter, Larry Greene, Executive Officer, SMAQMD, to Deborah Jordan, Director, Air Division, US EPA, Region 9, dated June 28, 2013.

• Control Requirements for PM_{10} *Precursors*

Section 189(e) of the CAA requires that the control requirements applicable under the part D SIP for major stationary sources of PM_{10} also apply to major stationary sources of PM_{10} precursors, except where the Administrator determines that such sources do not contribute significantly to PM_{10} levels which exceed the standard in the area. Sacramento's PM_{10} Maintenance Plan states that NO_X is a PM_{10} precursor in the secondary formation of atmospheric ammonium nitrates, which are a significant component of PM_{10} concentrations in the Sacramento area. SMAQMD also determined, based on analyses of inventories [16] from CARB and Chemical Mass Balance modeling, that emissions of sulfur oxides [17] (SO_X) and volatile organic compounds (VOCs) from sources in the Sacramento nonattainment area are an insignificant contributor to secondary particulate formation in the Sacramento PM_{10} nonattainment area. Therefore, SO_X and VOC emissions are not included in the Sacramento PM_{10} Maintenance Plan. See pages 4–1 and 5–4 in the Sacramento PM_{10} Maintenance Plan. To satisfy ozone nonattainment requirements in CAA section 182(b), SMAQMD has adopted Reasonably Available Control Technology rules to reduce NO_X emissions from existing sources. See Rules 411, 412, and 413 in Table 3 in this action. These rules also address the control requirements in CAA section 189(e) because they control NO_X emissions from major stationary sources. Major stationary sources of NO_X are also controlled by Rules 202 and 203, which are the District's nonattainment NSR and PSD permitting programs.

• Compliance with Section 110(a)(2)

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As noted above, we conclude the California SIP meets the requirements of section 110(a)(2) applicable for purposes of this redesignation.

[16] California Emission Forecasting System (CEFS) Version 1.06 Sacramento Metropolitan AQMD, Rf#980.

[17] The following SMAQMD measures were previously implemented to reduce sulfur dioxide emissions: Rule 406—Specific Contaminants and Rule 420—Sulfur Content of Fuels. These measures were approved into the SIP on December 5, 1984 (49 FR 47490). Adjusting for the past decrease in SO_X emissions, current ambient ammonium sulfate concentrations are estimated to be about 1 μg/m³.

• General and Transportation Conformity Requirements

Under section 176(c) of the Clean Air Act Amendments of 1990, states are required to establish criteria and procedures to ensure that federally supported or funded projects conform to the air quality planning goals in the applicable SIP. Section 176(c) further provides that state conformity provisions must be consistent with federal conformity regulations that the CAA requires EPA to promulgate. EPA's conformity regulations are codified at 40 CFR part 93, subparts A (referred to herein as "transportation conformity") and B (referred to herein as "general conformity"). Transportation conformity applies to transportation plans, programs, and projects developed, funded, and approved under title 23 U.S.C. or the Federal Transit Act, and general conformity applies to all other federally-supported or funded projects. SIP revisions intended to address the conformity requirements are referred to herein as "conformity SIPs."

EPA believes it is reasonable to interpret the conformity SIP requirements as not applying for purposes of a redesignation request under section 107(d) because state conformity rules are still required after redesignation and federal conformity rules apply where state rules have not been approved. See *Wall* v. *EPA,* 265 F. 3d 426 (6th Cir. 2001), upholding this interpretation. See also, 60 FR 62748 (December 7, 1995).

Thus, EPA proposes to determine that, if EPA later finalizes its approval of the Sacramento PM_{10} Maintenance Plan described in today's proposal and also finalizes its approval of the emissions inventory and motor vehicle emissions budgets for SMAQMD, the State has a fully-approved SIP meeting all requirements applicable under section 110 and part D for the Sacramento PM_{10} nonattainment area for purposes of redesignation. CAA Section 107(d)(3)(E)(v).

C. EPA Has Determined That the Improvement in Air Quality Is Due to Permanent and Enforceable Reductions in Emissions

Section 107(d)(3)(E)(iii) requires EPA to determine that the improvement in air quality is due to emission reductions that are permanent and enforceable resulting from the implementation of the applicable SIP and applicable Federal air pollution control regulations and other permanent and enforceable regulations in order to approve a redesignation to attainment. Under this criterion, the State must be able to reasonably attribute the improvement in air quality to emissions reductions which are permanent and enforceable. Attainment resulting from temporary reductions in emissions rates (e.g., reduced production or shutdown due to temporary adverse economic conditions) or unusually favorable meteorology would not qualify as an air quality improvement due to permanent and enforceable emission reductions. Calcagni memorandum, p. 4.

Historically, exceedances of the 24-hour PM_{10} NAAQS in the Sacramento nonattainment area occur in late November and December. The Chemical Mass Balance (CMB) model was used to identify source contributions for ambient air quality samples collected during the winter months (i.e., November through January) for 1991–1996. CMB uses known chemical "fingerprints" of various source types together with measurements of the chemical components of ambient PM_{10} to find the contribution of those sources to PM_{10} concentrations. CMB results show the main components of wintertime PM_{10} in the Sacramento nonattainment area were secondary ammonium nitrate particles (29%), motor vehicle exhaust from cars, trucks, and buses (23%), wood smoke (17%), and fugitive dust (12%).[18] The CMB analysis indicates how reductions in emissions of primary PM_{10} and PM_{10} precursors (e.g., NO_X) will reduce ambient PM_{10} concentrations; each of the ambient components can be "rolled back" in proportion to the emission changes in the corresponding source categories. The Sacramento PM_{10} Maintenance Plan credits control measures adopted and implemented by SMAQMD and CARB and approved into the SIP by EPA as reducing emissions to attain the 24-hour PM_{10} NAAQS.

The SMAQMD has jurisdiction over air quality planning requirements for Sacramento County. The SMAQMD has adopted numerous plans, rules, and revisions for Sacramento County in order to reduce PM_{10} and PM_{10} precursor emissions. The Sacramento PM_{10} Maintenance Plan includes a list of control measures adopted and implemented by SMAQMD and approved into the SIP by EPA as reducing emissions to attain the 24-hour PM_{10} NAAQS. Table 3 lists SMAQMD rules contributing towards attainment and/or continued attainment of the 24-hour PM_{10} NAAQS.

TABLE 3—SACRAMENTO METROPOLITAN AQMD CONTROL MEASURES AND PROGRAMS CONTRIBUTING TOWARDS ATTAINMENT AND/OR CONTINUED ATTAINMENT OF THE 24-HOUR PM_{10} NAAQS.

Rule	Title	Date approved into SIP	Citation
401	Ringelmann Chart/Opacity	02/01/1984	49 FR 3987.
403	Fugitive Dust	12/05/1984	49 FR 47490.
404	Particulate Matter	07/13/1987	52 FR 26148.
405	Dust and Condensed Fumes	12/05/1984	49 FR 47490.
406	Specific Contaminants	12/05/1984	49 FR 47490.
407	Open Burn	12/05/1984	49 FR 47490.
417	Wood Burning Appliances	04/11/2013	78 FR 21540.
408	Incinerator Burning	12/05/1984	49 FR 47490.

[18] See Sacramento PM_{10} Maintenance Plan, section 3.5, page 3–10.

TABLE 3—SACRAMENTO METROPOLITAN AQMD CONTROL MEASURES AND PROGRAMS CONTRIBUTING TOWARDS ATTAINMENT AND/OR CONTINUED ATTAINMENT OF THE 24-HOUR PM_{10} NAAQS.—Continued

Rule	Title	Date approved into SIP	Citation
409	Orchard Heaters	12/05/1984	49 FR 47490.
411	NO_X from Boilers, Process Heaters, and Steam Generators	08/01/2007	72 FR 41894.
412	Stationary Source Internal Combustion Engines at Major Stationary Sources of NO_X	04/30/1996	61 FR 18959.
413	Stationary Gas Turbines	02/11/1999	64 FR 6803.
414	Natural Gas Fired Water Heaters	04/20/1999, 11/01/2011	64 FR 19277 76 FR 67366.
420	Sulfur Content of Fuels	12/05/1984	49 FR 47490.
501	Agricultural Burning	12/05/1984	49 FR 47490.
Other SMAQMD measures or programs not in the SIP [19] [20]			
421	Mandatory Episodic Curtailment of Wood and Other Solid Fuel Burning.	Wood Stove/ Fireplace Change Out Incentive Program.	Spare The Air.

[19] On September 26, 2012, Rule 421 was submitted to EPA for inclusion in the SIP. The Wood Stove/Fireplace Change Out Incentive Program, Spare The Air public education program, and Sacramento Valley Air Basin Smoke Management Program have not been submitted for inclusion in the SIP.

[20] Sacramento County also participates in the State's Sacramento Valley Air Basin Smoke Management Program. The program describes the policies and procedures used with hourly and daily measurements of air quality and meteorology to determine how much open biomass burning can be allowed in the Sacramento Valley Air Basin. The program ensures that agricultural burning is prohibited on days meteorologically conducive to potentially elevated PM_{10} concentrations. The area covered by the program is referred to as the Sacramento Valley Air Basin, and includes all or parts of the following counties: Butte, Colusa, Glenn, Placer (portion), Sacramento, Shasta, Solano (portion), Sutter, Tehama, Yolo and Yuba. See Title 17 California Code of Regulations, Subchapter 2, Section 80100 et. seq. The regulations can be viewed at *http://www.arb.ca.gov/smp/regs/RevFinRegwTOC.pdf.*

Source: Categories for which CARB has primary responsibility for reducing emissions in California include most new and existing on- and off-road engines and vehicles, motor vehicle fuels, and consumer products. In addition, California has unique authority under CAA section 209 (subject to a waiver by EPA) to adopt and implement new emission standards for many categories of on-road vehicles and engines, and new and in-use off-road vehicles and engines. California has been a leader in the development of some of the most stringent control measures nationwide for on-road and off-road mobile sources and the fuels that power them. These measures have helped reduce primary PM_{10} and PM_{10} precursors in the Sacramento PM_{10} nonattainment area and throughout the State.

CARB's 2007 State Strategy and 2009 and 2011 updates to the State Strategy provide a recent summary of the measures adopted and implemented by the State.[21] From 1994 to 2006, the State promulgated more than thirty-five rules that have achieved significant emission reductions contributing to attainment and continued attainment in the Sacramento PM_{10} nonattainment area. *See* 2007 State Strategy, p.38.[22] [23] These measures include new emission standards and in-use requirements that have resulted in significant reductions in emissions of PM_{10} and PM_{10} precursors (e.g., NO_X) from categories such as passenger cars, trucks, buses, motorcycles, locomotives, cargo handling equipment, and large off-road equipment. EPA has generally approved into the SIP all of the State's measures that are not subject to the CAA section 209 waiver process. *See* EPA's final approval of the San Joaquin Valley $PM_{2.5}$ Plan at 76 FR 69896 (November 9, 2011) and accompanying *Technical Support Document and Responses to Comments.*[24] Finally, in addition to the local district and State rules discussed above, the Sacramento PM_{10} nonattainment area has also benefitted from emission reductions from federal measures. These federal measures include EPA's national emissions standards for heavy-duty diesel trucks (66 FR 5001 (January 18, 2001)), certain emissions standards for new construction and farm equipment (Tier 2 and 3 non-road engines standards, 63 FR 56968 (October 23, 1998) and Tier 4 diesel non-road engine standards, 69 FR 38958 (June 29, 2004)), and locomotive engine standards (63 FR 18978 (April

[21] See "Air Resources Board's Proposed State Strategy for California's 2007 State Implementation Plan," release date: April 26, 2007 (2007 State Strategy).

[22] The 2007 Proposed State Strategy can be found at: *http://arb.ca.gov/planning/sip/2007sip/apr07draft/sipback.pdf.* Page 38 of the Proposed State Strategy lists forty-five actions; thirty-five of these actions provide NO_X reductions.

[23] On August 12, 2009, CARB submitted the "Status Report on the State Strategy for California's 2007 State Implementation Plan (SIP) and Proposed Revision to the SIP Reflecting Implementation of the 2007 State Strategy," dated March 24, 2009 and adopted April 24, 2009 ("2009 State Strategy Status Report"). This submittal updated the 2007 State Strategy to reflect its implementation during 2007 and 2008. *See* CARB Resolution No. 09–34, April 24, 2009 and letter, James N. Goldstene, Executive Officer, CARB, to Wayne Nastri, Regional Administrator, EPA Region 9, August 12, 2009 with enclosures. Only pages 11–27 of the 2009 State Strategy Status Report are submitted as a SIP revision. The balance of the report is for informational purposes only. See Attachment A to CARB Resolution No. 09–34.

[24] Technical Support Document and Responses to Comments, Final Rule on the San Joaquin Valley 2008 $PM_{2.5}$ State Implementation Plan, September 30, 2011. This document can be found at: *http://www.regulations.gov/#!documentDetail;D=EPA-R09-OAR-2010-0516-0175.*

16, 1998) and 73 FR 37096 (June 30, 2008)).

The on-road and off-road vehicle and engine standards cited above have contributed to improved air quality through the gradual, continued turnover and replacement of older vehicle models with newer models manufactured to meet increasingly stringent emissions standards.

We note that many of the control measures cited above and in the Sacramento PM_{10} Maintenance Plan have provided emissions reductions since 1990, and thus, the improvement in air quality since 1990 may reasonably be attributed to them.

A sense of the effectiveness of the control measures to reduce PM_{10} and PM_{10} precursor emissions can be gained by comparing emissions in 1990 (a nonattainment year), 2000 (the year EPA determined the area met its attainment date) and 2008 (an attainment year).[25] In 1990, area-wide PM_{10} and NO_X emissions in the Sacramento PM_{10} nonattainment area were estimated to be approximately 37 and 133 tons per day (winter day), respectively. In 2000, despite an increase in population and vehicle-miles-traveled (VMT) of approximately 14% and 15%, respectively, area-wide emissions of PM_{10} dropped to 33 tons per day and NO_X declined to 100 tons per day compared. Despite increases between 1990 and 2008 in population (29%) and VMT (35%), area-wide emissions of direct PM_{10} decreased slightly to 35 tons per day. NO_X emissions decreased significantly to 82 tons per day, a reduction of approximately 38% compared to 1990 levels.

With respect to the connection between the emissions reductions and the improvement in air quality, we also conclude that the air quality improvement in the Sacramento PM_{10} nonattainment area since 1990 through 2011 is not the result of a local economic downturn or unusual or extreme weather patterns. Our conclusion is based on the air quality data in Table 1 and recognition that the fluctuation in economic and meteorological conditions since 1998 did not result in a violation of the 24-hour PM_{10} standard.[26] We do recognize that a significant economic slowdown occurred nationally starting in 2008, but we note that the downward PM_{10} trend had already been established before that time (see Figure 3.3 on page 3–7 of the Sacramento PM_{10} Maintenance Plan).

Thus, we find that the improvement in air quality in the Sacramento PM_{10} nonattainment area is the result of permanent and enforceable emissions reductions from a combination of EPA-approved local and State control measures and federal control measures. As such, we propose to find that the criterion for redesignation set forth at CAA section 107(d)(3)(E)(iii) is satisfied.

D. The Area Must Have a Fully Approved Maintenance Plan Under Clean Air Act Section 175A

Section 175A of the CAA sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. We interpret this section of the Act to require, in general, the following core elements: attainment inventory, maintenance demonstration plus a commitment to submit a second maintenance plan eight years after redesignation, monitoring network, verification of continued attainment, and contingency plan. See Calcagni memorandum, pages 8 through 13.

Under CAA section 175A, a maintenance plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after EPA approves a redesignation to attainment. Eight years after redesignation, the State must submit a revised maintenance plan that demonstrates continued attainment for the subsequent ten-year period following the initial ten-year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain such contingency provisions that EPA deems necessary to promptly correct any violation of the NAAQS that occurs after redesignation of the area. Based on our review and evaluation of the plan, as detailed below, we are proposing to approve the Sacramento PM_{10} Maintenance Plan because we believe that it meets the requirements of CAA section 175A.

1. Attainment Inventory

Section 172(c)(3) of the CAA requires plan submittals to include a comprehensive, accurate, and current inventory of actual emissions from all sources in the nonattainment area. In demonstrating maintenance in accordance with CAA section 175A and the Calcagni memorandum, the State should provide an attainment emissions inventory to identify the level of emissions in the area sufficient to attain the NAAQS. Where the State has made an adequate demonstration that air quality has improved as a result of the SIP, the attainment inventory will generally be an inventory of actual emissions at the time the area attained the standard. EPA's primary guidance in evaluating these inventories is the document entitled, ''PM–10 Emissions Inventory Requirements,'' EPA, OAQPS, EPA–454/R–94–033 (September 1994) which can be found at: *http://www.epa.gov/ttn/chief/eidocs/pm10eir.pdf.*

A maintenance plan for the 24-hour PM_{10} standard must include an inventory of emissions of PM_{10} and its precursors (NO_X, sulfur oxides, and volatile organic compounds) in the area to identify a level of emissions sufficient to attain the 24-hour PM_{10} NAAQS. This inventory must be consistent with EPA's most recent guidance on emissions inventories for nonattainment areas available at the time and should represent emissions during the time period associated with the monitoring data showing attainment. The inventory must also be comprehensive, including emissions from stationary point sources, area sources, and mobile sources.

SMAQMD selected year 2008 as the year for the attainment inventory in the Sacramento PM_{10} Maintenance Plan. Year 2008 is a current, accurate, and comprehensive inventory during a period which the area continued to attain the 24-hour PM_{10} standard prior to adoption and submittal of the redesignation request and maintenance plan. The attainment inventory will generally be the actual inventory during the time period the area attained the standard. EPA previously made an attainment determination for the Sacramento PM_{10} nonattainment area. See 67 FR 7082, February 15, 2002. Thus, Sacramento Metropolitan's selection of 2008 for the attainment inventory is acceptable.

Based on our review of the Sacramento PM_{10} Maintenance Plan, we find that the emissions inventories in the Plan are comprehensive in that they include estimates of PM_{10} and its precursors from all of the relevant source categories, which the Plan divides among stationary, area wide, on-road motor vehicles, and other mobile.

The Sacramento PM_{10} Maintenance Plan includes inventories for total primary PM_{10} and for NO_X as a PM_{10} precursor. See tables 4–1 and 4–2 in the Sacramento PM_{10} Maintenance Plan. Appendix A to the PM_{10} Maintenance Plan contains additional details of the emission inventories for 2008 (and 1990, 1995, 2000, 2012, and 2022). As previously described in section V.B.2, SMAQMD determined, based on analyses of inventories from CARB and Chemical Mass Balance modeling, that

[25] See Appendix A in the Sacramento PM_{10} Maintenance Plan.

[26] EPA's February 2002 determination that the Sacramento PM_{10} nonattainment area had attained the 24-hour PM_{10} NAAQS was based on complete, quality-assured, and certified ambient air monitoring data for 1998–2000.

emissions of SO_x and VOCs from sources in the Sacramento nonattainment area are an insignificant contributor to secondary particulate formation in the Sacramento PM_{10} nonattainment area. Therefore, SO_x and VOC emissions are not included in the Sacramento PM_{10} Maintenance Plan.

The stationary source category includes non-mobile, fixed sources of air pollution. Examples of sources included in this category include fuel combustion (e.g., electric utilities), waste disposal (e.g., landfills), and oil and gas production. SMAQMD's 2008 (and subsequent year inventories) for stationary sources were developed using methods in CARB's 2009 Almanac [27] and information reported by emission sources to SMAQMD and entered into the California Emission Inventory Development and Reporting System (CEIDARS) database.[28] For area wide sources, SMAQMD calculated emissions based on reported data for fuel usage, product sales, population, employment data, and other parameters covering a wide range of activities.[29]

The on-road mobile source category consists of trucks, automobiles, buses, and motorcycles. The on-road emissions inventory estimates in the Sacramento PM_{10} Plan were prepared by CARB using EMFAC2007 (version 2.3), a California model for on-road motor vehicle emissions.[30] The vehicle miles traveled were developed from Sacramento Area Council of Governments-supplied activity data using transportation modeling prepared for the Sacramento region's August 2009 Metropolitan Transportation Improvement Program.[31]

With respect to nonroad mobile sources (or other mobile as categorized in the PM_{10} Plan), the category includes aircraft, trains, boats, and off-road vehicles and equipment used for construction, farming, commercial, industrial, and recreational activities. CARB used its OFFROAD2007 to calculate the nonroad emissions.[32] In general, emissions are calculated using equipment population, engine size and load, usage activity, and emission factors.

Table 4 presents the direct PM_{10} and PM_{10} precursor emissions (i.e., NO_X) estimates contained in the Sacramento PM_{10} Maintenance Plan for 2008. Based on the estimates in table 4, the area-wide category of emissions accounted for 86% of the direct PM_{10}, with residential fuel combustion making up 28%, construction and demolition 20%, and paved road dust 17% of the total direct PM_{10} inventory for 2008. Mobile source emissions accounted for 90% of the NO_X emissions generated within the PM_{10} nonattainment area in 2008 with on-road motor vehicle emissions comprising approximately 61% and off-road equipment 20% of the total NO_X inventory for 2008.

TABLE 4—2008 ACTUAL PM_{10} EMISSIONS FROM VARIOUS SOURCE CATEGORIES IN THE SACRAMENTO PM_{10} NONATTAINMENT AREA, TOTAL DAILY EMISSIONS

[Tons per day, average winter day][a]

Category	Emission source	2008	
		PM_{10}	NO_X
Stationary	Fuel Combustion	0.5	3.9
	Industrial Processes	1.0	0.1
Area wide	Residential Fuel Combustion	9.9	4.4
	Farming Operations	2.4	
	Construction and Demolition	7.0	
	Paved Road Dust	6.1	
	Unpaved Road Dust	3.6	
	Managed Burning and Disposal		0.1
	Other	1.2	
On-Road Motor Vehicles	On-Road Motor Vehicles	2.2	49.6
Other Mobile	Aircraft	0.1	2.0
	Trains	0.1	3.4
	Boats	0.1	0.5
	Equipment (Off-Road/Farm)	1.1	17.8
Totals		35	82

[a] From Appendix A in the Sacramento PM_{10} Maintenance Plan.

Based on our review of the emissions inventories (and related documentation) from the Sacramento PM_{10} Maintenance Plan, we find that the inventories for 2008 are comprehensive, that the methods and assumptions used by CARB and SMAQMD to develop the emission inventories are reasonable, and that the 2008 inventory reasonably estimates actual PM_{10} emissions in the attainment year. Therefore, we are proposing to approve the 2008 inventory, which serves as the Sacramento PM_{10} Maintenance Plan's attainment year inventory, as satisfying the requirements of section 172(c)(3) of the CAA for the purposes of redesignation of the Sacramento PM_{10} nonattainment area to attainment of the 24-hour PM_{10} NAAQS.

2. Maintenance Demonstration

Section 175A(a) of the CAA requires that the maintenance plan ''provide for the maintenance of the national primary ambient air quality standard for such air pollutant in the area concerned for at

[27] The 2009 Almanac contains information about current and historical air quality and emissions in California. In addition, forecasted emissions are presented. See *http://www.arb.ca.gov/aqd/almanac/almanac09/almanac09.htm*

[28] The CEIDARS database consists of two categories of information: *source information* and *utility information.* Source information includes the basic inventory information generated and collected on all point and area sources. Utility information generally includes auxiliary data, which helps categorize and further define the source information. Used together, CEIDARS is capable of generating complex reports based on a multitude of category and source selection criteria.

[29] For more information on emissions from the area-wide source category, see the CARB Web site: *http://www.arb.ca.gov/ei/areasrc/areameth.htm.*

[30] EMFAC software and detailed information on the vehicle emission model can be found on the CARB Web site at *http://www.arb.ca.gov/msei/onroad/on-road.htm.*

[31] Metropolitan Transportation Improvement Program 2009/12, Sacramento Area Council of Governments, August 21, 2008.

[32] See *http://www.arb.ca.gov/msei/offroad/offroad.htm*

least 10 years after the redesignation.'' Generally, a state may demonstrate maintenance of the 24-hour PM_{10} NAAQS by modeling to show that the future mix of sources and emissions rates will not cause a violation of the NAAQS. A showing that future emissions will not exceed the level of the attainment year inventory can also be used to further support of a maintenance demonstration. For areas that are required under the Act to submit modeled attainment demonstrations, the maintenance demonstration should use the same type of modeling. Calcagni memorandum, page 9.

In addition to accounting for area-wide growth trends, SMAQMD included growth in airport emissions to accommodate future airport expansions within the Sacramento County Airport System.[33] The portion of the 2012 and 2022 inventories associated with airports is detailed in table 5.

TABLE 5—AIRPORT EMISSIONS FOR SACRAMENTO COUNTY ONLY, TOTAL DAILY EMISSIONS

[Tons per day, average winter day] [a]

Emission source	NO_X		PM_{10}	
	2012	2022	2012	2022
Aircraft Operations Only	2.3	3.0	0.1	0.1
Ground Support Equipment	0.3	0.2	0.1	0.1

[a] From table 4–4 in the Sacramento PM_{10} Maintenance Plan.

SMAQMD also included emissions reduction credits (ERCs) from pre-2008 ERCs, future bankable rice burning ERCs, and the wood stove/fireplace change out incentive program in the event that the ERCs are used for the purposes of issuing permits for new or modified stationary sources in the air quality planning area.[34]

We have reviewed the methods and assumptions, as described in connection with the attainment inventory, that SMAQMD used to project emissions to 2012 and 2022 for the various source categories and find them to be reasonable. The Sacramento PM_{10} Maintenance Plan's maintenance demonstration is based on the use of Chemical Mass Balance (CMB) with proportional rollback (69 FR 5412, 5424–5425 and 69 FR 30006) to demonstrate maintenance of the 24-hour PM_{10} standard until 2022. See Plan, pp. 6–1—6–5. Under proportional rollback, changes in source categories' emissions are added in proportion to their corresponding component from CMB. In proportional rollback, a 1% change in direct PM_{10} emissions causes a 1% change in the direct PM_{10} ambient component. However, because ammonium nitrate is secondary PM, that is, it is formed from chemical reactions in the air, it does not necessarily scale one-to-one with the precursor NO_X emissions. The Plan relied on photochemical modeling results showing that a 1% change in NO_X emission causes only a 0.7% change in ammonium nitrate. See Plan, p. 6–3.

The results of the modeling show that all monitoring sites in the Sacramento PM_{10} nonattainment area will be below the 24-hour PM_{10} NAAQS in 2022, with the projected value of 99 μg/m3 at the T Street site, which had the peak monitored value from 2006–2008 in the Sacramento PM_{10} nonattainment area. See Plan, Table 6.3.

In addition to the CMB rollback modeling in the Sacramento PM_{10} Maintenance Plan, it also demonstrates that the 2022 maintenance year inventory is well below the 2008 attainment year inventory for PM_{10} precursors (i.e., NO_X) and flat for direct PM_{10}. Thus, even without the rollback analysis previously described, the Plan clearly demonstrates maintenance of the PM_{10} NAAQS through 2022. Tables 6, 7 and 8 compare inventory estimates for direct PM_{10} and PM_{10} precursor (i.e., NO_X) for various years, including the 2008 attainment year, 2012, and the 2022 maintenance year. Since current ambient concentrations are well below the NAAQS, the slight increase in projected direct PM_{10} emissions is consistent with maintenance of the NAAQS. Even if all ambient PM_{10} were directly emitted (i.e., without accounting for the benefit of NOx reductions), the 2008 measured ambient level of 109 μg/m^3 could increase by 37% and remain below the NAAQS, so direct PM_{10} emissions could also increase by 37% and the area would remain in attainment. In fact, direct PM_{10} is projected to increase by only 3% (or 7% considering potential increases in road dust allowed for in the Motor Vehicle Emissions Budget). This is a very conservative conclusion, because is assumes NOx emissions are constant, whereas they are actually projected to decrease by 50%, with an accompanying reduction in the ammonium nitrate component of PM_{10}. The effects of the declining NOx and slightly increasing PM constitute a variant of simple rollback modeling, and can be considered a second, supporting maintenance demonstration method in addition to the CMB proportional rollback demonstration.

TABLE 6—SUMMARY OF 2008 ACTUAL AND 2012 AND 2022 PROJECTED PM_{10} AND NO_X EMISSIONS IN THE SACRAMENTO PM_{10} NONATTAINMENT AREA

[Tons per day, average winter day] [a]

Pollutants	2008	2012	2022
PM_{10}	35	35	36
NO_X	82	67	42

[a] From Appendix A in the Sacramento PM_{10} Maintenance Plan; includes Emission Reduction Credits in 2012 and 2022 for PM_{10} and NO_X in table 4–5 of the Sacramento PM_{10} Maintenance Plan.

Based on our review of the 2012 and 2022 emissions inventories and related documentation from the Sacramento PM_{10} Maintenance Plan, we find that the 2012 and 2022 emissions inventories in the PM_{10} Maintenance Plan reflect the latest planning assumptions and emissions models available at the time the Plan was developed, and provide a comprehensive and reasonably accurate basis upon which to forecast direct PM_{10} and PM_{10} precursor emissions for years 2012 and 2022.[35] These inventories further support maintenance through 2022.

[33] See Sacramento PM_{10} Maintenance Plan, section 4.7, page 4–10.

[34] See Sacramento PM_{10} Maintenance Plan, section 4.7, page 4–11.

[35] The 2022 emission inventory includes emissions reductions from State measures adopted through 2006. Because the measures in Table 3 were adopted after 2006, the 2022 inventory is a conservative estimate of the projected emissions. December 27, 2012 email from Martin Johnson of CARB to John Ungvarsky, EPA.

TABLE 7—2008 ACTUAL AND 2012 AND 2022 PROJECTED PM_{10} EMISSIONS FROM VARIOUS SOURCE CATEGORIES IN THE SACRAMENTO PM_{10} NONATTAINMENT AREA, TOTAL DAILY EMISSIONS

[Tons per day, average winter day] [a]

Category	Emission source	PM_{10}		
		2008	2012	2022
Stationary	Fuel Combustion	0.5	0.5	0.6
	Industrial Processes	1.0	0.9	1.1
Area wide	Residential Fuel Combustion	9.9	9.2	10.2
	Farming Operations	2.4	2.3	2.1
	Construction and Demolition	7.0	7.2	7.8
	Paved Road Dust	6.1	6.2	6.4
	Unpaved Road Dust	3.6	3.6	3.6
	Other	1.2	1.3	1.4
On-Road Motor Vehicles	On-Road Motor Vehicles	2.2	2.1	2.1
Other Mobile	Aircraft	0.1	0.1	0.1
	Trains	0.1	0.1	0.1
	Boats	0.1	0.1	0.1
	Equipment (Off-Road/Farm)	1.1	1.0	0.4
Totals		35	35	36

[a] From Appendix A in the Sacramento PM_{10} Maintenance Plan.

TABLE 8—2008 AND PROJECTED 2012 AND 2022 NO_X EMISSIONS FROM VARIOUS SOURCE CATEGORIES IN THE SACRAMENTO PM_{10} NONATTAINMENT AREA, TOTAL DAILY EMISSIONS

[Tons per day, average winter day] [a]

Category	Emission source	NO_X		
		2008	2012	2022
Stationary	Fuel Combustion	3.9	4.0	4.2
	Industrial Processes	0.1	0.1	0.1
Areawide	Residential Fuel Combustion	4.4	4.3	4.4
	Managed Burning and Disposal	0.1	0.1	0.1
On-Road Motor Vehicles	On-Road Motor Vehicles	49.6	37.6	18.1
Other Mobile	Aircraft	2.0	2.3	3.0
	Trains	3.4	3.3	3.6
	Boats	0.5	0.5	0.5
	Off-Road Equipment	16.0	13.6	7.6
	Farm Equipment	1.8	1.4	0.6
Totals		82	67	42

[a] From Appendix A in the Sacramento PM_{10} Maintenance Plan.

Taking the CMB results into account gives an even stronger conclusion with respect to the acceptability of the slight increase of direct PM_{10} emissions. According to the CMB proportional rollback, direct PM_{10} contributes 81 μg/m³ of the 2008 total. See Plan, Table 6.3, p. 6–5. Considering the measured 109 μg/m³, that component could increase by 41 μg/m³, or 50%, and the sum would remain below the NAAQS. When combined, the projected slight PM_{10} emissions increase and substantial NO_X emissions decrease are well below the levels consistent with attainment through the 2022 maintenance period and thereby adequately demonstrate maintenance through that period.

a. Showing That Maintenance Plan Provides for Ten Years of Maintenance Through 2023

Section 175A requires a state seeking redesignation to attainment to submit a SIP revision to provide for the maintenance of the NAAQS in the area ''for at least 10 years after the redesignation.'' EPA has interpreted this as a showing of maintenance ''for a period of ten years following redesignation.'' September 4, 1992 Memorandum from John Calcagni, Director, AQMD, ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' p. 9.

As discussed in detail above, the Sacramento PM_{10} Maintenance Plan expressly documents that the area's emissions inventories will remain below the attainment year inventories through 2022. In addition, for the reasons set forth below, EPA believes that the State's submission, in conjunction with additional supporting information, further demonstrates that the area will continue to maintain the 24-hour PM_{10} NAAQS at least through 2023. Thus, if EPA finalizes its proposed approval of the redesignation request and maintenance plans in 2013, it will be based in part on a showing, in accordance with section 175A, that the Sacramento PM_{10} Maintenance Plan provides for maintenance for at least ten years after redesignation. EPA believes the area will continue to maintain the 24-hour PM_{10} NAAQS at least through 2023 for the following reasons.

1. Significant emissions controls remain in place and will continue to provide reductions that keep the area in attainment. Because the Sacramento area is currently nonattainment for the 1997 and 2008 ozone standards and the 2006 24-hour $PM_{2.5}$ standard, it is expected that not only will existing emissions controls remain in place, but the Sacramento area may need additional reductions (e.g., NO_X) to attain the aforementioned standards. In addition, the emissions controls that brought the area into attainment cannot be removed from the SIP unless the

State demonstrates that the removal would be consistent with sections 110(l) and 193 of the CAA.

2. The 2022 projected emissions inventory for PM_{10} precursors is well below the 2008 attainment year level and is expected to decline or remain stable during the 2022 to 2023 period. It is extremely improbable that emissions would increase between 2022 and 2023 such that they would exceed the 2008 attainment year levels. As shown in table 7, while primary PM_{10} emissions have remained relatively flat, by 2022 NO_X emissions are projected to decline by approximately 70% and 49% when compared to 1990 and 2008, respectively. The majority of these reductions resulted from cleaner fuels, tighter emission standards, and fleet turnover in the mobile source sector. The 2022 emission inventory is conservative in that it does not include reductions from State measures adopted after 2006. Because Sacramento is nonattainment for the 1997 and 2008 ozone standards and the 2006 24-hour $PM_{2.5}$ standard, SMAQMD and the State may need to adopt additional measures that will further reduce emissions between 2013 and 2023. Because fundamental relaxations or changes to the existing SIP-approved measures, mobile source fleet, and infrastructure cannot be easily made or reversed during the 2022–2023 period, it is highly unlikely that PM_{10} and PM_{10} precursor emissions would increase significantly between 2022 and 2023 to the extent it would jeopardize a showing of maintenance for a 10-year period after redesignation.

3. Fleet turnover supports a continued gradual decrease in emission levels beyond 2025. Specifically, California's Low Emission Vehicle (LEV) program sets gasoline and vehicle emissions standards for passenger cars, light trucks, and larger passenger vehicles. The program was designed to reduce emissions, including NO_X, responsible for the ozone and particulate matter impacts from these vehicles. The LEV 2 standards were phased in between 2004 and 2010, have been replaced by the LEV 3 standards adopted in 2012. The LEV 3 standards represent a further strengthening of the program and are planned to be phased in between 2015 and 2025. Consequently, the full emission reduction benefits from the LEV 2 and 3 standards will not be achieved until after 2022 and continue beyond 2023.[36] The relationship between the LEV standards and fleet turnover is just one example of a measure providing continued NO_X emissions reductions between 2022 and 2023 because of continued fleet turnover.

4. Air quality concentrations are well below the 24-hour PM_{10} NAAQS, and, when coupled with the emissions inventory projections through 2022, clearly show it would be very unlikely for a PM_{10} violation to occur in 2023. The Sacramento PM_{10} nonattainment area has not violated the 24-hour PM_{10} NAAQS since 1990. Air quality concentrations for the three most recent years (2009–2011) of complete, quality-assured, and certified ambient air monitoring data show the highest monitored PM_{10} concentration to be 76 $\mu g/m^3$, approximately half of the PM_{10} NAAQS. The historical trend of the maximum 24-hour PM_{10} peak concentrations between 1989 and 2011 indicates a steady decline.[37] As shown in table 7, by 2022 PM_{10} precursor emissions (NO_X) will drop significantly compared to 2008, and direct PM_{10} emissions will remain relatively flat. The combination of the air quality concentrations well below the standard and the declining inventory as described above indicate it is highly unlikely that the Sacramento PM_{10} nonattainment area will violate the 24-hour PM_{10} NAAQS during the 2022 to 2023 period.

For the above reasons, EPA believes the area will continue to maintain the 24-hour PM_{10} NAAQS at least through 2023 and that the Sacramento PM_{10} Maintenance Plan shows maintenance for a period of ten years following redesignation. Thus, if EPA finalizes its proposed approval of the Sacramento PM_{10} Maintenance Plan in 2013, it is based on a showing, in accordance with section 175A, that the Sacramento PM_{10} Maintenance Plan provides for maintenance for at least ten years after redesignation.

3. Verification of Continued Attainment

In demonstrating maintenance, continued attainment of the NAAQS can be verified through operation of an appropriate air quality monitoring network. The Calcagni memorandum states that the maintenance plan should contain provisions for continued operation of air quality monitors that will provide such verification. Calcagni memorandum, p. 11. As discussed in section V.A. of this document, PM_{10} is currently monitored by SMAQMD (five sites) and CARB (one site) within the Sacramento PM_{10} nonattainment area. In the Sacramento PM_{10} Maintenance Plan (see Plan, p. 7–1), SMAQMD indicates its intention to continue operation of an air quality monitoring network that meets or exceeds the minimum monitoring requirements and that ambient PM_{10} concentrations will be monitored appropriately to verify continued attainment of the 24-hour PM_{10} NAAQS. The Sacramento PM_{10} Maintenance Plan also notes that a review of the entire monitoring network will be undertaken annually as required by federal regulations.[38] We find the SMAQMD's commitment for continued ambient PM_{10} monitoring as set forth in the Sacramento PM_{10} Maintenance Plan to be acceptable.

Second, the transportation conformity process, which would require a comparison of on-road motor vehicle emissions that would occur under new or amended regional transportation plans and programs with the MVEBs in the PM_{10} Maintenance Plan, represents another means by which to verify continued attainment of the 24-hour PM_{10} NAAQS in Sacramento County. See page 8–1 of the Sacramento PM_{10} Maintenance Plan.

Lastly, while not cited in the Plan, CARB and SMAQMD must inventory emissions sources and report to EPA on a periodic basis under 40 CFR part 51, subpart A (''Air Emissions Reporting Requirements''). These emissions inventory updates will provide a third way to evaluate emissions trends in the area and thereby verify continued attainment of the NAAQS. These methods are sufficient for the purpose of verifying continued attainment.

4. Contingency Provisions

Section 175A(d) of the Clean Air Act requires that maintenance plans include contingency provisions, as EPA deems necessary, to promptly correct any violations of the NAAQS that occur after redesignation of the area. Such provisions must include a requirement that the State will implement all measures with respect to the control of the air pollutant concerned that were contained in the SIP for the area before redesignation of the area as an attainment area. These contingency provisions are distinguished from those

[36] 2011 records from CARB's inspection and maintenance program indicate approximately 20% of the fleet had not yet turned over after 15 years. It is reasonable to assume that because the LEV 2 standards were not fully implemented until 2009, the reductions from the program will continue through 2023, which would represent the 14 years of turnover affected by the LEV 2 standards. Thus, it is reasonable to conclude reductions from fleet turnover would continue even beyond 2023. To see the report, go to: *http://www.bar.ca.gov/80_BARResources/04_Miscellaneous/USEPA%202010%20Calendar%20Year.pdf.*

[37] See Sacramento PM_{10} Maintenance Plan, Figure 3.3, page 3–7.

[38] EPA's requirements for annual review of monitoring networks are found at 40 CFR 58.10.

generally required for nonattainment areas under section 172(c)(9) in that they are not required to be fully-adopted measures that will take effect without further action by the state in order for the maintenance plan to be approved. However, the contingency plan is considered to be an enforceable part of the SIP and should ensure that the contingency measures are adopted expeditiously once they are triggered by a specified event.

Under section 175A(d), contingency measures identified in the contingency plan do not have to be fully adopted at the time of redesignation. However, the contingency plan is considered to be an enforceable part of the SIP and should ensure that the contingency measures are adopted expeditiously once they are triggered by a specified event. The maintenance plan should clearly identify the measures to be adopted, a schedule and procedure for adoption and implementation, and a specific timeline for action by the State. As a necessary part of the plan, the State should also identify specific indicators or triggers, which will be used to determine when the contingency measures need to be implemented.

As required by section 175A of the CAA, SMAQMD has adopted a contingency plan to address possible future PM_{10} air quality problems. The contingency provisions in the Sacramento PM_{10} Maintenance Plan are contained in section 7.3 of the Plan and were clarified in a subsequent letter from the District.[39] After verification of the 24-hour PM_{10} NAAQS violation, including allowing sufficient time for sample weighing and processing, SMAQMD commits to the following steps.

(1) Examine the violation to determine if it qualifies as a natural or exceptional event.

(2) If the violation was not a natural or exceptional event, SMAQMD will analyze the event to determine its plausible causes. Any applicable emission reductions from already adopted rules that have not yet been implemented would be evaluated to determine if these new emission reductions would be sufficient to prevent future PM_{10} exceedances. These already adopted controls could include CARB and SMAQMD $PM_{2.5}$ and NO_X measures to address ozone and $PM_{2.5}$ SIP requirements. In addition, the SMAQMD would evaluate applicable reasonably available control measures (RACM) that could potentially provide the corrective action needed. This evaluation step will take no more than 18 months.

(3) If the additional emission reductions from already adopted rules are insufficient, the SMAQMD would proceed with selecting specific RACM measures for adoption and implementation that would be applicable to addressing the seasonal PM_{10} problem. Appendix B in the Sacramento PM_{10} Maintenance Plan contains potential RACM measures to be evaluated for future adoption and implementation. This adoption and implementation step will take no more than 12 months.

In their June 28, 2013 letter, SMAQMD clarified that all three of the aforementioned steps will be completed, including the implementation of additional control measures, within 24 months.

Upon our review of the Plan, as summarized above, we find that the contingency provisions of the Sacramento PM_{10} Maintenance Plan clearly identify specific contingency measures, contain tracking and triggering mechanisms to determine when contingency measures are needed, contain a description of the process of recommending and implementing contingency measures, and contain specific timelines for action. Thus, we conclude that the contingency provisions of the Sacramento PM_{10} Maintenance Plan are adequate to ensure prompt correction of a violation and therefore comply with section 175A(d) of the Act. For the reasons set forth above, EPA is proposing to find that the Sacramento PM_{10} Maintenance Plan is consistent with the maintenance plan contingency provision requirements of the CAA and EPA guidance.

5. Subsequent Maintenance Plan Revisions

Section 175A(b) of the CAA provides that eight years after redesignation, the State must submit a revised maintenance plan that demonstrates continued attainment for the subsequent ten-year period following the initial ten-year maintenance period. The Sacramento PM_{10} Maintenance Plan includes a SMAQMD commitment to prepare and submit a revised maintenance plan in 2020, seven years after redesignation to attainment. See page 6–7 of the Sacramento PM_{10} Maintenance Plan.

In light of the discussion set forth above, EPA is proposing to approve the Sacramento PM_{10} Maintenance Plan as meeting the requirements of CAA section 175A.

6. Transportation Conformity and Motor Vehicle Emissions Budgets

a. Requirements for Transportation Conformity and Motor Vehicle Emissions Budgets

Under section 176(c) of the CAA, transportation plans, programs and projects in the nonattainment or maintenance areas that are funded or approved under title 23 U.S.C. and the Federal Transit Laws (49 U.S.C. chapter 53) must conform to the applicable SIP. In short, a transportation plan and program are deemed to conform to the applicable SIP if the emissions resulting from the implementation of that transportation plan and program are less than or equal to the motor vehicle emissions budgets (budgets) established in the SIP for the attainment year, maintenance year and other years. See, generally, 40 CFR part 93 for the federal conformity regulations and 40 CFR 93.118 specifically for how budgets are used in conformity.

The budgets serve as a ceiling on emissions that would result from an area's planned transportation system. The budget concept is further explained in the preamble to the November 24, 1993, transportation conformity rule (58 FR 62188). Maintenance plan submittals must specify the maximum emissions of transportation-related PM_{10} and NO_X emissions allowed in the last year of the maintenance period, i.e., the motor vehicle emissions budgets (MVEBs). (MVEBs may also be specified for additional years during the maintenance period.) The submittal must also demonstrate that these emissions levels, when considered with emissions from all other sources, are consistent with maintenance of the NAAQS.

b. Motor Vehicle Emissions Budgets in the Sacramento PM_{10} Maintenance Plan

The Sacramento PM_{10} Maintenance Plan contains PM_{10} and NO_X MVEBs for the Sacramento PM_{10} nonattainment area for 2008, 2012, and 2022. The MVEBs are the on-road mobile source primary PM_{10} and NO_X (as a PM_{10} precursor) emissions for Sacramento County for 2008, 2012 and 2022. The MVEBs are compatible with the 2008, 2012, and 2022 on-road mobile source PM_{10} and NO_X emissions included in SMAQMD's 2008, 2012, and 2022 p.m.$_{10}$ and NO_X emission inventories, as summarized above in tables 6, 7 and 8. The derivation of the MVEBs is thoroughly discussed in section 8 of the Sacramento PM_{10} Maintenance Plan.[40]

[39] See letter, Larry Greene, Executive Officer, SMAQMD, to Deborah Jordan, Director, Air Division, US EPA, Region 9, dated June 28, 2013.

[40] Additional information associated with the motor vehicle emission budget calculations is

Continued

The motor vehicle emissions budgets for Sacramento are summarized in table 9.

TABLE 9—SUMMARY OF MOTOR VEHICLE EMISSIONS BUDGETS (TONS PER DAY, AVERAGE WINTER DAY) IN THE SACRAMENTO PM_{10} MAINTENANCE PLAN [41]

Budget year	PM_{10}	NO_X
2008	15	50
2012	15	38
2022	17	19

The details for each component of the budgets are shown in table 10 and are comprised of direct on-road mobile source emissions, road construction emissions, fugitive emissions from paved and unpaved roads, and safety margins. A state may choose to apply a safety margin under our transportation conformity rule so long as such margins are explicitly quantified in the applicable plan and are shown to be consistent with attainment or maintenance of the NAAQS (whichever is relevant to the particular plan).[42] In this instance, the safety margin has been explicitly quantified and shown to be consistent with continued maintenance of the PM_{10} NAAQS through the applicable maintenance period, through 2023. The MVEBs incorporate: (1) On-road motor vehicle emission inventory factors of EMFAC2007 [43] and AP–42; [44] and (2) updated recent vehicle activity data from Sacramento Area Council of Governments' Sacramento Activity-Based Travel Demand Simulation Model transportation modeling system.

TABLE 10—SOURCE CATEGORIES AND EMISSIONS COMPRISING THE MOTOR VEHICLE EMISSIONS BUDGETS (TONS PER DAY, AVERAGE WINTER DAY) IN THE SACRAMENTO PM_{10} MAINTENANCE PLAN [45]

Category	2008		2012		2022	
	NO_X	PM_{10}	NO_X	PM_{10}	NO_X	PM_{10}
Direct Exhaust [a]	49.6	2.2	37.6	2.1	18.1	2.1
Paved Road Dust		6.1		4.9		5.5
Unpaved Road Dust		3.6		3.6		3.6
Road Construction Dust		2.7		2.8		2.8
Safety Margin [46]				1.3		2.5
Totals (rounded up to nearest ton)	50	15	38	15	19	17

[a] Direct Exhaust includes PM_{10} from tire and brake wear.

c. Initial Adequacy Review of Budgets

On September 1, 2011, EPA announced the availability of the Sacramento PM_{10} Maintenance Plan with MVEBs and a 30-day public comment period on EPA's Adequacy Web site at: *http://www.epa.gov/otaq/stateresources/transconf/reg9sips.htm#ca.* The comment period for this notification ended on October 3, 2011, and EPA received no comments from the public. On November 23, 2011, EPA published in the **Federal Register** (76 FR 72404) a finding of adequacy for the PM_{10} MVEBs for the years 2008, 2012, and 2022.

d. Updated Technical Review

As described earlier, the budgets were developed using emission factors generated by CARB's EMFAC2007 model and AP–42. The paved road emissions were originally calculated using the 2006 version of AP–42 by estimating the 2008 paved road emissions and projecting them to 2012 and 2022. The calculation relied on a California profile of silt loading, weather, and growth in roadway centerline miles.

EPA released an update to *Compilation of Air Pollutant Emission Factors* (AP–42) in January of 2011, which revised the equation for estimating paved road dust emissions based on an updated regression that included new emission tests results. CARB staff conducted an additional technical analysis of the Sacramento County paved road emission projections using the updated AP–42 equation and growth in vehicle miles traveled, to ensure that the motor vehicle emission budgets were still consistent with the currently approved modeling tools and data and the maintenance demonstration. The technical analysis showed that the updated paved road emissions provided safety margins in 2012 and 2022 as compared to the attainment inventory emissions of paved road dust which was used in establishing the MVEBs in the Sacramento PM_{10} Maintenance Plan.[47] Therefore, the total MVEBs are consistent with maintenance of the standard.

e. Proposed Actions on the Budgets

EPA is proposing to approve the MVEBs for 2008, 2012 and 2022 as part of our approval of Sacramento PM_{10} Maintenance Plan. EPA has determined that the MVEB emission targets are consistent with emission control measures in the SIP and that Sacramento County can maintain attainment of the 24-hour PM_{10} NAAQS. Because the budgets EPA found

provided in a technical analysis accompanying June 2013 letters from ARB and SMAQMD to EPA.

[41] See Table 8.1, page 8–4 of the Sacramento PM_{10} Maintenance Plan.

[42] See 40 CFR 93.124(a).

[43] EMFAC (*EM*ission *FAC*tor) is California's model for estimating emissions from on-road vehicles operating in California. EPA approved EMFAC2007 on January 18, 2008 (73 FR 3464). CARB's latest release is EMFAC 2011 which EPA approved on March 6, 2013 (78 FR 14533) was not approved when this plan was developed.

[44] AP–42, *Compilation of Air Pollutant Emission Factors,* is a document published by EPA as the primary collection of EPA approved emission factor information. The emission factors have been developed and compiled from source test data, material balance studies, and engineering estimates. EPA has publishes supplements and updates to the each of the chapters available in Volume I, Stationary Point and Area Sources at the following Web site: *http://www.epa.gov/ttnchie1/ap42/.*

[45] *Ibid.*

[46] The Sacramento PM_{10} Maintenance Plan includes PM_{10} MVEB safety margins of 1.3 tons per day (tpd) for 2012 and 2.4 tpd for 2022. This additional increase may be needed for the Sacramento Area Council of Governments to make a transportation conformity determinations, including for a horizon year of 2035 or later for transportation planning purposes when using the latest year of motor vehicle emissions budgets (2022) in the Sacramento PM_{10} Maintenance Plan. See letter, Larry Greene, Executive Officer, SMAQMD, to Deborah Jordan, Director, Air Division, US EPA, Region 9, dated June 28, 2013. Also see letter, Lynn Terry, Deputy Executive Officer, CARB, to Deborah Jordan, Director, Air Division, US EPA, Region 9, dated June 13, 2013.

[47] See letter, Lynn Terry, Deputy Executive Officer, CARB, to Deborah Jordan, Director, Air Division, US EPA, Region 9, dated June 13, 2013. See Letter, Larry Greene, Executive Director/Air Pollution Control Officer, SMAQMD, to Deborah Jordan, Director Air Division, US EPA, Region 9, dated June 28, 2013.

adequate in 2011 are the same budgets EPA is proposing to approve in this action, if EPA approves the MVEBs in the final rulemaking action, it would not change the budgets currently in use for future transportation conformity determinations for Sacramento County. As discussed in section V.D.2.a of this notice, EPA is proposing that if this approval is finalized in 2013 the area will continue to maintain the 24-hour PM_{10} NAAQS through at least 2023. Consistent with this proposal, EPA is proposing to approve the MVEBs submitted by the State in the Sacramento PM_{10} Maintenance Plan. EPA is proposing that the submitted budgets, when combined with EPA's additional analysis for the 2022–2023 time period, are consistent with maintenance of the 24-hour PM_{10} NAAQS through 2023.

VI. Proposed Action and Request for Public Comment

Based on our review of the Sacramento PM_{10} Maintenance Plan submitted by the State, air quality monitoring data, and other relevant materials, EPA is proposing to find that the State has addressed all the necessary requirements for redesignation of the Sacramento nonattainment area to attainment of the PM_{10} NAAQS, pursuant to CAA sections 107(d)(3)(E) and 175A.

First, under CAA section 107(d)(3)(D), we are proposing to approve CARB's request, which accompanied the submittal of the Sacramento PM_{10} Maintenance Plan, to redesignate the Sacramento PM_{10} nonattainment area to attainment for the 24-hour PM_{10} 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 is based on our proposed determination that the area has attained the 24-hour PM_{10} 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 Sacramento PM_{10} nonattainment area with respect to section 110 and part D of the CAA; and is based on our proposed approval of the Sacramento PM_{10} Maintenance Plan as part of this action.

Second, in connection with the Sacramento PM_{10} Maintenance Plan and EPA's analysis showing maintenance through 2023, EPA finds that the maintenance demonstration showing how the area will continue to attain the 24-hour PM_{10} NAAQS for 10 years beyond redesignation (i.e., through 2023) and the contingency provisions describing the actions that SMAQMD will take in the event of a future monitored violation meet all applicable requirements for maintenance plans and related contingency provisions in section 175A of the CAA. EPA is also proposing to approve the motor vehicle emissions budgets in the Sacramento PM_{10} Maintenance Plan because we find they meet the applicable transportation conformity requirements under 40 CFR 93.118(e). Lastly, EPA is proposing to approve the 2008 inventory, which serves as the Sacramento PM_{10} Maintenance Plan's attainment year inventory, as satisfying the requirements of section 172(c)(3) of the CAA.

We are soliciting comments on these proposed actions. We will accept comments from the public on this proposal for 30 days following publication of this proposal in the **Federal Register.** We will consider these comments before taking final action.

VII. 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 propose to 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 proposed 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 proposed 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. In addition, there are no federally recognized tribes located within the Sacramento PM_{10} nonattainment area.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide.

40 CFR Part 81

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

Dated: July 12, 2013.

Alexis Strauss,

Acting Regional Administrator, Region IX.

[FR Doc. 2013–17825 Filed 7–23–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1990–0010; FRL–9836–8]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Deletion of the Sola Optical U.S.A., Inc. Superfund Site

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule; notice of intent.

SUMMARY: The Environmental Protection Agency (EPA) Region 9 is issuing a Notice of Intent to Delete the Sola Optical U.S.A., Inc. Superfund Site (Site) located in Petaluma, California, 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 California, through the Regional Water Quality Control Board—San Francisco Bay Region, have determined that all appropriate response actions under CERCLA have been completed. However, this deletion does not preclude future actions under Superfund.

DATES: Comments must be received by August 23, 2013.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–1990–0010, by one of the following methods:

- *http://www.regulations.gov.* Follow on-line instructions for submitting comments.
- *Email: rodriguez.dante@epa.gov.*
- *Fax:* (415) 947–3528.
- *Mail:* Dante Rodriguez, U.S. EPA Region 9, Mail code SFD–8–2, 75 Hawthorne Street, San Francisco, CA 94105.
- *Hand delivery:* U.S. EPA Region 9, 75 Hawthorne Street, Mail code SFD–8–2, San Francisco, CA 94105.

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–1990–0010. 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 statue. 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:

Superfund Records Center, 95 Hawthorne St., Room 403, Mail Stop SFD–7C, San Francisco, CA 94105, (415) 536–2000, Mon–Fri: 8:00 a.m. to 5:00 p.m. or

Petaluma Public Library, 100 Fairgrounds Drive, Petaluma CA 94952, (707) 763–9801, Mon, Thurs, Fri, Sat: 10:00 a.m. to 6:00 p.m., Tues, Wed: 10:00 a.m. to 9:00 p.m.

FOR FURTHER INFORMATION CONTACT: Dante Rodriguez, Remedial Project Manager, U.S. Environmental Protection Agency, Region 9, SFD–8–2, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3166, email: *rodriguez.dante@epa.gov.*

SUPPLEMENTARY INFORMATION: In the ''Rules and Regulations'' Section of today's **Federal Register**, we are publishing a direct final Notice of Deletion of Sola Optical U.S.A., Inc. Superfund Site without prior Notice of Intent to Delete because we view this as a noncontroversial revision and anticipate no adverse comment. We have explained our reasons for this deletion in the preamble to the direct final Notice of Deletion, and those reasons are incorporated herein. If we receive no adverse comment(s) on this deletion action, we will not take further action on this Notice of Intent to Delete. If we receive adverse comment(s), we will withdraw the direct final Notice of Deletion, and it will not take effect. We will, as appropriate, address all public comments in a subsequent final Notice of Deletion based on this Notice of Intent to Delete. We will not institute a second comment period on this Notice of Intent to Delete. Any parties interested in commenting must do so at this time.

For additional information, see the direct final Notice of Deletion which is located in the *Rules* section of this **Federal Register**.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

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: July 15, 2013.

Jane Diamond,

Director, Water Division, U.S. EPA Region 9.

[FR Doc. 2013–17826 Filed 7–23–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 100

RIN 0906–AB00

National Vaccine Injury Compensation Program

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary has made findings as to intussusceptions that can reasonably be determined in some circumstances to be caused or

significantly aggravated by rotavirus vaccines. Based on these findings, the Secretary proposes to amend the Vaccine Injury Table (Table) by regulation. These proposed regulations will apply only for petitions for compensation under the National Vaccine Injury Compensation Program (VICP) filed after the final regulations become effective. The Secretary is seeking public comment on the proposed revisions to the Table.

DATES: Written comments must be submitted on or before January 21, 2014. A public hearing on this proposed rule will be held before the end of the public comment period. A separate notice will be published in the **Federal Register** to provide the details of this hearing. Subject to consideration of the comments received, the Secretary intends to publish a final regulation.

ADDRESSES: You may submit comments in one of three ways, as listed below. The first is the preferred method. Please submit your comments in only *one* of these ways to minimize the receipt of duplicate submissions.

1. *Federal eRulemaking Portal.* You may submit comments electronically to *http://www.regulations.gov.* Click on the link ''Submit electronic comments on HRSA regulations with an open comment period.'' Submit your comments as an attachment to your message or cover letter. (Attachments should be in Microsoft Word or WordPerfect; however, Microsoft Word is preferred).

2. *By regular, express, or overnight mail.* You may mail written comments to the following address only: Health Resources and Services Administration, Department of Health and Human Services: Attention: HRSA Regulations Officer, Parklawn Building, Room 14–101, 5600 Fishers Lane, Rockville, MD 20857. Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *Delivery by hand (in person or by courier).* If you prefer, you may deliver your written comments before the close of the comment period to the same address: Parklawn Building, Room 14–101, 5600 Fishers Lane, Rockville, MD 20857. Please call in advance to schedule your arrival with one of our HRSA Regulations Office staff members at telephone number (301) 443–1785. This is not a toll-free number.

Because of staffing and resource limitations, and to ensure that no comments are misplaced, HRSA cannot accept comments by facsimile (FAX) transmission. In commenting, by any of the above methods, please refer to file code (HRSA #0906–AB00). All comments received on a timely basis will be available for public inspection without charge, including any personal information provided, in Room 14–101 of the Health Resources and Services Administration's offices at 5600 Fishers Lane, Rockville, MD., on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (excluding federal holidays). Phone: (301) 443–1785. This is not a toll-free number.

FOR FURTHER INFORMATION CONTACT: Please visit the National Vaccine Injury Compensation Program's Web site, *http://www.hrsa.gov/vaccinecompensation/,* or contact Dr. Catherine Shaer, Acting Chief Medical Officer, National Vaccine Injury Compensation Program, Healthcare Systems Bureau, Health Resources and Services Administration, Parklawn Building, Room 11C–26, 5600 Fishers Lane, Rockville, MD 20857. Phone calls can be directed to (855) 266–2427. This is a toll-free number.

SUPPLEMENTARY INFORMATION:

Background

Under Title XXI of the Public Health Service (PHS) Act, individuals who demonstrate a vaccine-related injury or death may receive compensation through the National Vaccine Injury Compensation Program (VICP). To gain entitlement to compensation in the VICP, a petitioner must demonstrate that the injured or deceased individual received a vaccine set forth in the Vaccine Injury Table (a ''covered vaccine'') and sustained a vaccine-related injury or death. A petitioner can prove a vaccine-related injury or death in two ways: (1) The petitioner can show that the vaccine recipient suffered an injury listed in the Vaccine Injury Table corresponding with the vaccine received, and that the onset of such injury occurred within the time period specified in the Table (a ''Table injury''). As set out in sections 2111(c)(1)(C)(i), 2113(a)(1)(B), and 2114(a) of the PHS Act, a Table injury or death is given the legal presumption that it was caused by the vaccination. (2) If the petitioner cannot demonstrate a Table injury, the petitioner can prevail by proving, by a preponderance of the evidence, that the vaccine caused the injury or death (an ''off-Table injury''). In either case, a petitioner must also show that the injury was sufficiently severe by demonstrating that such person suffered the residual effects of the injury for more than 6 months; died from the administration of the vaccine; or that the alleged injury resulted in inpatient hospitalization and surgical intervention. Section 2111(c) of the PHS Act. If the petitioner can prove a Table injury or off-Table injury, the petitioner is entitled to compensation unless it is affirmatively shown by the Secretary that the injury was caused by some factor unrelated to the vaccination.

Under section 2114(e)(2) of the PHS Act, when the Centers for Disease Control and Prevention (CDC) recommends a vaccine for routine administration to children, the Secretary is required to amend the Vaccine Injury Table to include such vaccine. Coverage becomes effective when an excise tax is imposed on the vaccine. Additionally, the Secretary is authorized to include specific adverse events on the Table with respect to each covered vaccine, including the time period when the first symptoms or manifestations of onset or other significant aggravation of such adverse event may occur. Under section 2114(c) of the PHS Act, the Secretary may make such modifications to the Table by promulgating regulations, with notice and opportunity for a public hearing, and at least 180 days of public comment.

Coverage for Rotavirus Vaccines on the Vaccine Injury Table

The general category of rotavirus vaccines was added for coverage under the VICP, effective October 22, 1998. The prerequisites for adding rotavirus vaccines to the VICP were satisfied by the enactment of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. 105–277 (October 21, 1998), which imposed an excise tax of 75 cents per dose on ''any vaccine against rotavirus gastroenteritis,'' and the publication of the CDC recommendation of the vaccine for ''routine use in children'' in the ''Morbidity and Mortality Weekly Report'' (MMWR), 1999:48 (March 19, 1999).

When the general category of rotavirus vaccines was added to the Table, it was added with ''no condition specified.'' 64 FR 40517. In other words, at the time rotavirus vaccines were first included for coverage under the Program, the Secretary had not identified any adverse events to include in the Table. Therefore, individuals who received the rotavirus vaccine did not receive a legal presumption of causation for any claimed injury and were required to prove that the vaccine actually caused the claimed injury.

History of Rotashield Vaccine

On August 31, 1998, the Food and Drug Administration (FDA) licensed a live, oral, rhesus-based rotavirus tetravalent vaccine (trade name

''Rotashield'') for use in infants between the ages of 6 weeks and 1 year. Distribution of the vaccine began on October 1, 1998. At the time, this was the only U.S.-licensed rotavirus vaccine on the market. Following a review by the Advisory Committee on Immunization Practices (ACIP), the CDC published its rotavirus recommendation in the March 19, 1999, issue of the MMWR (1999:48), calling for doses to be administered at 2, 4, and 6 months of age, with the first dose to be administered between 6 weeks and 6 months. The series was not to be initiated in children who were 7 months of age or older due to an increased rate of febrile (fever) reactions after the first dose among older infants.

Over the next eight months, the Secretary's Vaccine Adverse Event Reporting System (VAERS) began receiving reports of intussusception (a type of bowel obstruction that occurs when the bowel folds into itself) in infants receiving the Rotashield vaccine after the first dose. Based on an analysis of 15 reports, the CDC, in the July 16, 1999, issue of the MMWR, recommended that health care providers and parents postpone use of this rotavirus vaccine. The CDC undertook additional epidemiological studies to determine if there was a true association between the vaccine and intussusception. Also, at that time, the manufacturer, in consultation with the FDA, voluntarily ceased further distribution of the vaccine. Upon further consideration, and following consultation with CDC officials in preparation for the upcoming ACIP meeting, the manufacturer announced the withdrawal of the Rotashield vaccine (which was still the only U.S.-licensed rotavirus vaccine at that time) from the market on October 15, 1999, and requested the immediate return of all doses of the vaccine.

At its October 22, 1999, meeting, the ACIP reviewed scientific data from several sources, including a 19-state case-control study which showed a statistically significant rate of intussusception among recipients of the live, oral, rhesus-based rotavirus vaccine in the 2 week period following vaccine administration, with the highest risk period in the 3–14 days after the first dose of vaccine, and a much smaller risk in the same time period after dose two. Beyond 14 days, there did not appear to be more cases than might occur by chance alone. The ACIP concluded that intussusception occurs with significantly increased frequency in the first 14 days following administration of the Rotashield vaccine and withdrew its recommendation for use of this vaccine in infants. The CDC adopted and published the Committee's decision in the November 5, 1999, issue of the MMWR.

By December 2000, VAERS had received over 100 reports of confirmed intussusception cases, 58 of which had onset within 7 days of vaccine receipt. Of the cases reported, approximately one-half required surgical intervention. Nearly all of the other cases of bowel obstruction were relieved through barium enema, a radiological procedure used to both diagnose and often rectify the telescoped bowel segment, or resolved spontaneously without any intervention. At least one death associated with rotavirus vaccine was reported to VAERS.

The Secretary reviewed the epidemiological data, and in a notice of proposed rulemaking published on July 13, 2001, the Secretary announced his findings that the condition of intussusception could reasonably be determined in some circumstances to be caused by vaccines containing live, oral, rhesus-based rotavirus (66 FR 36735). Based on those findings, the Secretary proposed to amend the Table by adding the specific category of vaccines containing live, oral, rhesus-based rotavirus as a distinct category, with intussusception listed as a covered Table injury. This proposal was based on data indicating a strong association between Rotashield and intussusception in the two weeks following vaccination.

In a final rule published July 25, 2002 (67 FR 48558), the Secretary made final the changes proposed in the earlier notice. After these amendments, the Table included two categories of rotavirus vaccines. The first, the general category of rotavirus vaccines, did not include an associated injury. This category of vaccines was effective as of October 22, 1998, the effective date of the excise tax imposed for rotavirus vaccines. See 42 CFR 100.3(a), 100.3(c)(3). The second, more specific category of vaccines containing live, oral, rhesus-based rotavirus, contained an associated injury of intussusception with an onset interval of 0–30 days. The live, oral, rhesus-based rotavirus vaccine was covered in the VICP effective October 22, 1998, but the Table injury could only be claimed by those petitioners that had the vaccine administered on or before August 26, 2002 (the effective date of the final rule adding this category of vaccine), and beginning on August 26, 1994, the period of the eight-year ''look back'' prescribed in the statute. Because the manufacturer of the only U.S.-licensed rotavirus vaccine at the time voluntarily ceased distribution of the vaccine in July 1999, and because the CDC recommended that this vaccine no longer be routinely administered to children in the United States in October 1999, the Secretary concluded that it was unlikely that potential claims under this specific category would arise after the rule's publication. Because of this, the final rule limited the Table injury of intussusception to live, oral, rhesus-based rotavirus vaccines administered on or before the effective date of the final rule (August 26, 2002). Individuals who sought compensation for injuries related to such a vaccine administered after the effective date of the final rule were not entitled to the presumption of a Table injury for intussusception, but such individuals could still file claims under the Table's general category for rotavirus vaccines.

Through an interim final rule published October 9, 2008 (73 FR 59528), the Secretary removed the specific category of vaccines containing live, oral, rhesus-based rotavirus from the Table. Given the applicable statute of limitations and the fact that this category limited its application to vaccines administered on or before August 26, 2002, the Secretary believed that any potential Table claim under this category would have been time-barred, so no persons could have had claims under that category.

Subsequent Rotavirus Vaccines

On February 3, 2006, the FDA licensed a pentavalent human-bovine reassortant rotavirus vaccine (trade name ''RotaTeq''). Following a review by ACIP, the CDC published its recommendation for routine vaccination of U.S. infants with three doses of this rotavirus vaccine administered orally at ages 2, 4, and 6 months (MMWR 2006:55; RR12). On April 3, 2008, the FDA licensed a monovalent rotavirus vaccine derived from the human rotavirus strain (trade name ''Rotarix''). In June 2008, the CDC updated its recommendation to include use of the newly licensed Rotarix (MMWR 2009:58; RR02). The prelicensure clinical trials for RotaTeq examined 70,000 infants, and did not identify an increased risk of intussusception in the 1–42 days post immunization. In addition, the prelicensure clinical trials for Rotarix examined over 60,000 infants, and found no increased risk in the 1–31 days after vaccination with either dose. Because of the prior association of intussusception with Rotashield, multiple post-marketing studies regarding RotaTeq, Rotarix, and intussusception were conducted to evaluate the possibility of a small risk of intussusception as utilization increased.

RotaTeq Scientific History

In February 2007, the FDA notified health care providers and consumers about 28 post-marketing reports of intussusception following administration of RotaTeq. The notification stated that of the reported 28 cases of intussusception, the number that may have been caused by the vaccine, or occurred by coincidence, was unknown. The FDA issued this notification both to encourage the reporting of any additional cases of intussusception that may have occurred in the past or will occur in the future after administration of RotaTeq, and to remind people that intussusception may be a potential complication of RotaTeq.

In 2008, the Vaccine Safety Datalink (VSD) published their experience from the first 111,521 doses of RotaTeq given from 2006 to 2007, and in 2012, the VSD and the CDC published data in ''The Journal of the American Medical Association'' (JAMA), from 786,725 doses of RotaTeq given from 2006 to 2010. There was no identifiable risk in the 1–7 day or 1–30 day periods following administration of RotaTeq in either analysis. The final post-marketing study of RotaTeq in the U.S. was performed by Merck and found no association with intussusception and RotaTeq. Post-marketing clinical trials of RotaTeq performed after U.S. licensure included two smaller efficacy studies from Africa and Asia. The African study had no cases of intussusception in either vaccine or placebo groups, and the Asian study had one case 97 days following the third dose of the placebo, and no cases in the vaccine group.

A 2011 post-marketing study of RotaTeq published in ''Vaccine,'' from the Australian National Immunization Program, suggests an association between RotaTeq and intussusception. Approximately 295,000 doses of RotaTeq were given in two states. In 1–3 month old infants, the expected number of intussusception cases was exceeded for the 1–7 and 1–21 day periods following the first dose of RotaTeq. In the 1–7 days following the first dose, three cases were found, compared to an expected 0.57 cases (relative risk of 5.26 [confidence interval (CI), 1.1–15.4]). (Relative risk is the ratio of the chance of a disease developing among members of a population exposed to a factor compared with a similar population not exposed to the factor.) [Confidence Intervals are a measure of estimation that represents the possible range of values in a population estimated from a given sample drawn from that population (in this case ranging from a relative risk value of 1.1 to 15.4)].

When the 1–21 day interval following the first dose was examined, six cases of intussusception were found, compared to an expected 1.71 cases (relative risk 3.5 [CI, 1.3–7.6]). There was no increase from the expected cases after dose two of RotaTeq, and actually a decrease from expected cases after dose three. Also important to note is that there was no evidence of increased risk of intussusception when examining the entire period of 1–9 months of age.

Rotarix Scientific History

Rotarix was given in the other two states evaluated in the Australian post-marketing study, totaling approximately 302,000 doses. The study demonstrated an increased risk in both the 1–7 day and the 1–21 day windows following the first dose of Rotarix (relative risk of 3.45 [CI 0.7–10] and 1.53 [CI, 0.4–3.9], respectively). Neither of these risks showed statistical significance. There were no excess cases of intussusception associated with dose two of Rotarix. Similar to RotaTeq, the number of observed cases in the post-vaccine windows was small, with three cases observed in the 1–7 days after first dose vaccination versus 0.9 cases expected for the 1–3 month old infants. Since Rotarix constitutes a small percentage of total rotavirus vaccine given in the U.S. (3 million doses of Rotarix versus 35 million doses of RotaTeq as of 2010), comparable U.S. post-licensure studies of Rotarix are not currently available.

Post-marketing studies (case series and case-control analysis) performed in Mexico and Brazil, and published in ''The New England Journal of Medicine'' in 2011, identified an association between Rotarix and intussusception. In Mexico, there was an increased rate of intussusception during the 1–7 day period after the first dose of Rotarix with an incidence rate ratio of 5.3 (CI, 3–9.3). (Incidence rate ratio compares two incidence rates. Incidence rate is the number of new cases per population in a given time period.) There was no increase in the rate 1–7 days after the second dose, but a small increase by a factor of two was identified in the second and third week following the second dose. This contrasts with the Brazil data where there was no increase in the rate of intussusception found after the first dose of Rotarix, but a small elevation of the rate was identified 1–7 days following the second dose (incidence ratio of 2.6 [CI, 1.3–5.2]). The reason behind the variation between the data from Mexico and Brazil is unclear, but one potential explanation could be a result of Brazil's administering Rotarix and the oral polio virus vaccine (OPV) together, which has been shown to decrease the immunogenicity of the first dose of Rotarix, perhaps making the second dose function more like the initial dose.

The commentary in ''The New England Journal of Medicine'' in 2011 regarding the Rotarix data from Mexico and Brazil summarized the small attributable risk of intussusception as 1/51,000 vaccinated infants in Mexico and 1/68,000 vaccinated infants in Brazil. [Attributable risk is the difference in rate of a condition (intussusception in this case) between an exposed population (those who received rotavirus vaccine in this case) and an unexposed population.] The article raised the possibility that any live, oral, rotavirus vaccine, along with natural rotavirus infection, could carry a detectable risk of intussusception, although the risk is demonstrably quite low, based on the available studies. It is also biologically plausible that the different vaccines have differing intrinsic risks of intussusception based on the distinct strains in each vaccine, and that the same vaccine could manifest different risks in different populations. It is also possible that with small risks overall (resulting in a small number of excess intussusception cases in the specific narrow age groups receiving vaccine) and variability in background numbers of cases of intussusception year to year, an increase in overall burden of intussusception in infants aged < 1 year may not be detectable. The article raised the point that the small increase of intussusception after vaccination does not seem to increase the overall burden of intussusception, and that perhaps the rotavirus vaccination has a preventive role in long-term intussusception risk.

Because of these findings, the prescribing information in the U.S. for Rotarix was amended in September 2010 to reflect the above increased risk and the potential implications for U.S. infants. (GlaxosmithKline Biologicals Package Insert (PI) and Patient Package Information (PPI)). The PI and PPI were further amended in February 2011 to include ''history of intussusception'' as a contraindication to vaccination. (Statement available for viewing at *http://www.fda.gov/BiologicsBloodVaccines/Vaccines/ApprovedProducts/ucm245491.htm*). A ''history of intussusception'' was also made a contraindication for Rotateq in July 2011.

In addition, a large post-marketing surveillance study of intussusception in Mexico published in ''The Pediatric Infectious Disease Journal'' in July 2012 reported an ''attributable risk of 3 to 4 additional cases of intussusception per 100,000 vaccinated infants after receipt if Rotarix.

CDC Response

In November 2010, the CDC issued a statement noting that some, but not all, studies suggest RotaTeq and Rotarix may possibly cause a small increase in the risk of intussusception; however, the CDC concluded that the benefits of these vaccines far outweigh this possible risk. The CDC continues to recommend routine rotavirus vaccination of U.S. infants to prevent severe rotavirus disease in U.S. infants and children. (Statement available for viewing at *http://www.cdc.gov/vaccines/vpd-vac/rotavirus/intussusception-studies-acip.htm*).

The FDA's mini-sentinel ''Post-Licensure Rapid Immunizations Safety Monitoring Program'' (PRISM) is currently performing a study to assess the risk of intussusception from both Rotarix and RotaTeq vaccines in the United States. This self-controlled and case-centered study targets approximately 1 million infants. Results are expected late in 2012.

Proposed Rule

The Secretary has reviewed all the currently available data regarding the Rotarix and RotaTeq vaccines and the risk of intussusception. The background of the Rotashield experience in the U.S. and the recently published literature from Mexico, Brazil, and Australia supports a small attributable risk of intussusception after the first and second doses of Rotarix and RotaTeq (with a greater amount of data supporting an association with the first dose of both vaccines). Therefore, the Secretary proposes that the injury of intussusception be added to the general Table category of ''rotavirus vaccines'' to allow a presumption of causation for claims that meet the requirements set forth in the Table for that injury. Current U.S. studies of RotaTeq do not show a statistically identifiable risk of intussusception, but the number of study patients exposed to the vaccine in the U.S. may not be large enough (even with the results expected from the ongoing PRISM study) to rule out a very small attributable risk to the vaccine. Platforms like VSD in the U.S. have not been able to evaluate the possible small risk associated with Rotarix to date because of the low numbers of doses of Rotarix administered in settings captured by the surveillance program. To allow for a generous timeframe, the Secretary proposes that the Table injury for intussusception have an onset interval of 1–21 days under sections 2114(c) and (e) of the PHS Act, since evidence shows the increased risk within the 1–7 days following immunization with peaks in the fourth and fifth days.

The Qualifications and Aids to Interpretation section of the table will define the injury of ''intussusception'' as the invagination of a segment of intestine into the next segment of intestine, resulting in bowel obstruction, diminished arterial blood supply, and blockage of the venous blood flow. This is characterized by a sudden onset of abdominal pain that may be manifested by anguished crying, irritability, vomiting, abdominal swelling, and/or passing of stools mixed with blood and mucus. The definition for presumption of vaccine causation only applies to the first and second dose of vaccine, and excludes intussusception occurring with or after the third dose. The third dose of rotavirus vaccines lacks sufficient evidence showing risk.

The definition also delineates the alternative causes of intussusception which, if present in a case, would prevent it from qualifying as a Table injury. The alternative causes were classified into four categories: infectious diseases; anatomic lead points; anatomic bowel abnormalities; and underlying gastrointestinal or systemic diseases. Cases of intussusception where the onset was within 14 days after an infectious disease secondary to non-enteric or enteric adenovirus, other enteric viruses (such as Enterovirus), enteric bacteria (such as Campylobacter jejuni), or enteric parasites (such as Ascaris lumbricoides) would not qualify as a Table injury. Proof of these alternate causes may be demonstrated by clinical signs and symptoms and need not be confirmed by culture or serologic testing.

Cases of intussusception in a person with a pre-existing condition identified as the lead point for intussusception, such as intestinal masses and cystic structures (e.g., polyps; tumors; Meckel's diverticulum; lymphoma; or duplication cysts), would not qualify as a Table injury. Additionally, cases of intussusception in a person with abnormalities of the bowel, including congenital anatomic abnormalities, anatomic changes after abdominal surgery, and other anatomic bowel abnormalities caused by mucosal hemorrhage, trauma, or abnormal intestinal blood vessels (such as Henoch Scholein purpura, hematoma, or hemangioma); or in a person with underlying conditions or systemic diseases associated with intussusception (such as cystic fibrosis, celiac disease, or Kawasaki disease) would not qualify as a Table injury.

Petitioners may be eligible for compensation for vaccine-related cases of intussusception in which the onset is before 1 day or beyond 21 days, or where the condition does not satisfy the criteria under the Qualifications and Aids to Interpretation for intussusception (an ''off-Table'' claim), however the petitioners will be required to prove causation-in-fact. Regardless of whether the claim satisfies the criteria in the Table, all petitioners must demonstrate sufficient severity of the injury by proving that the injured person: 1) suffered the residual effects or complications of the alleged vaccine-related injury for more than 6 months after vaccine's administration; 2) died from administration of the vaccine; or 3) sustained inpatient hospitalization and surgery as a result of the alleged vaccine-related injury. Section 2111(c)(1)(D), PHS Act (42 U.S.C. 300aa–11(c)(1)(D)). In the case of rotavirus vaccine administration and subsequent intussusception, the Secretary does not consider a reduction of intussusception with an enema to be ''surgical intervention.''

Petitions must also be filed within the applicable statute of limitations. The general statute of limitations applicable to petitions filed with the VICP, set forth in section 2116(a) of the PHS Act (42 U.S.C. 300aa–16(a)), continues to apply. In addition, section 2116(b) of the PHS Act identifies a specific exception to this statute of limitations that applies when the effect of a revision to the Table makes a previously ineligible person eligible to receive compensation or when an eligible person's likelihood of obtaining compensation significantly increases. Under this section, individuals who may be eligible to file petitions based on the revised Table may file a petition for compensation not later than 2 years after the effective date of the revision if the injury or death occurred not more than 8 years before the effective date of the revision of the Table (42 U.S.C. 300aa–16(b)).

The Advisory Commission on Childhood Vaccines (ACCV) voted unanimously to approve this proposal at its December 9, 2011, meeting. The Secretary, while moving forward with this proposal, understands that additional science is still forthcoming and recognizes the importance of keeping the Vaccine Injury Table in conformance with science. In addition, the Secretary recognizes that one goal of the VICP is to provide generous compensation to petitioners harmed by vaccines through a less adversarial system. Although post-marketing studies in the U.S. have not identified an increased risk of intussusception associated with rotavirus vaccine, a small risk cannot be ruled out. Therefore, the Secretary feels that the balance between science and policy is best met by acting now, on the basis of the studies outside the U.S. that have detected an increased risk of intussusception following Rotarix and RotaTeq vaccines, rather than waiting to see if the PRISM, VSD, and other studies further bolsters the already published findings.

Economic and Regulatory Impact

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when rulemaking is necessary, to select regulatory approaches that provide the greatest net benefits (including potential economic, environmental, public health, safety, distributive, and equity effects). In addition, under the Regulatory Flexibility Act, if a rule has a significant economic effect on a substantial number of small entities, the Secretary must specifically consider the economic effect of a rule on small entities and analyze regulatory options that could lessen the impact of the rule.

Executive Order 12866 requires that all regulations reflect consideration of alternatives, costs, benefits, incentives, equity, and available information. Regulations must meet certain standards, such as avoiding an unnecessary burden. Regulations that are ''significant'' because of cost, adverse effects on the economy, inconsistency with other agency actions, effects on the budget, or novel legal or policy issues, require special analysis.

The Secretary has determined that no resources are required to implement the requirements in this rule. Compensation will be made in the same manner. This proposed rule only lessens the burden of proof for potential petitioners. Therefore, in accordance with the Regulatory Flexibility Act of 1980 (RFA) and the Small Business Regulatory Enforcement Act of 1996, which amended the RFA, the Secretary certifies that this rule will not have a significant impact on a substantial number of small entities.

The Secretary has also determined that this proposed rule does not meet the criteria for a major rule as defined by Executive Order 12866, and it would not have a major effect on the economy or federal expenditures. The Department has determined that the proposed rule is not a ''major rule'' within the meaning of the statute providing for Congressional Review of Agency Rulemaking, 5 U.S.C. § 801. Similarly, it will not have effects on state, local, and tribal governments, or on the private sector such as to require consultation under the Unfunded Mandates Reform Act of 1995.

The Secretary finds that the provisions of this rule will not have an adverse affect on family well-being, because this rule does not affect the following family elements: family safety; family stability; marital commitment; parental rights in the education, nurture, and supervision of their children; family functioning; disposable income or poverty; or the behavior and personal responsibility of youth, as determined under section 654(c) of the Treasury and General Government Appropriations Act of 1999.

This rule is not being treated as a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

As stated above, this proposed rule would modify the Vaccine Injury Table based on legal authority.

Impact of the New Rule

To date, 17 petitions have been filed alleging a vaccine-related injury of intussusception caused or aggravated by a rotavirus vaccine, not including the currently unavailable Rotashield vaccine. This proposed rule will have the effect of decreasing the burden of proof for future petitioners. Under this proposed rule, future petitioners alleging the injury of intussusception as the result of a rotavirus vaccine that meets the criteria in the Vaccine Injury Table will be afforded a presumption of causation. This proposed rule will not change the burden of proof applicable to petitioners alleging other injuries related to a rotavirus vaccine who must rely on a causation-in-fact analysis.

Paperwork Reduction Act of 1980

This proposed rule has no information collection requirements.

List of Subjects in 42 CFR Part 100

Biologics, Health Insurance, and Immunization.

Dated: June 26, 2013.

Mary Wakefield,

Administrator, Health Resources and Services Administration.

Approved: July 17, 2013.

Kathleen Sebelius,

Secretary.

Accordingly, 42 CFR part 100 is proposed to be amended as set forth below:

PART 100—VACCINE INJURY COMPENSATION.

■ 1. The authority citation for 42 CFR part 100 continues to read as follows:

Authority: Sec. 215 of the Public Health Service Act (42 U.S.C. 216); sec. 2115 of the PHS Act; 100 Stat. 3767, as revised (42 U.S.C. 300aa–15); § 100.3 Vaccine Injury Table, issued under secs. 312 and 313 of Pub. L. 99–660, 100 Stat. 3779–3782 (42 U.S.C. 300aa–1 note); and sec. 2114(c) and (3) of the PHS Act, 100 Stat. 3766 and 107 Stat. 645 (42 U.S.C. 300aa–14(c) and (e)); sec. 904(b) of Pub. L. 105–34, 111 Stat. 873; and sec. 523(a) of Pub. L. 106–170, 113 Stat. 1860.

■ 2. Amend § 100.3 in the paragraph (a) table by revising Item XI and by adding paragraph (b)(3) to read as follows:

§ 100.3 Vaccine injury table.

(a) * * *

VACCINE INJURY TABLE

Vaccine	Illness, disability, injury, or condition covered	Time period for first symptom or manifestation of onset or of significant aggravation after vaccine administration
* * *	* * *	*
XI. Rotavirus vaccines	A. Intussusception	1–21 days.
	B. Any acute complication or *sequela* (including death) of an illness, disability, injury, or condition referred to above which illness, disability, injury, or condition arose within the time period prescribed.	Not applicable.

VACCINE INJURY TABLE—Continued

Vaccine	Illness, disability, injury, or condition covered	Time period for first symptom or manifestation of onset or of significant aggravation after vaccine administration
* * *	* *	* *

(b) * * *

(3) *Intussusception.* (i) For purposes of paragraph (a) of this section, intussusception means the invagination of a segment of intestine into the next segment of intestine, resulting in bowel obstruction, diminished arterial blood supply, and blockage of the venous blood flow. This is characterized by a sudden onset of abdominal pain that may be manifested by anguished crying, irritability, vomiting, abdominal swelling, and/or passing of stools mixed with blood and mucus.

(ii) For purposes of paragraph (a) of this section, the following shall not be considered to be a Table intussusception:

(A) Onset that occurs with or after the third dose of a vaccine containing rotavirus;

(B) Onset within 14 days after an infectious disease associated with intussusception, including viral disease (such as those secondary to non-enteric or enteric adenovirus, or other enteric viruses such as Enterovirus), enteric bacteria (such as *Campylobacter jejuni*), or enteric parasites (such as *Ascaris lumbricoides*), which may be demonstrated by clinical signs and symptoms and need not be confirmed by culture or serologic testing;

(C) Onset in a person with a pre-existing condition identified as the lead point for intussusception such as intestinal masses and cystic structures (such as polyps, tumors, Meckel's diverticulum, lymphoma, or duplication cysts);

(D) Onset in a person with abnormalities of the bowel, including congenital anatomic abnormalities, anatomic changes after abdominal surgery, and other anatomic bowel abnormalities caused by mucosal hemorrhage, trauma, or abnormal intestinal blood vessels (such as Henoch Scholein purpura, hematoma, or hemangioma); or

(E) Onset in a person with underlying conditions or systemic diseases associated with intussusception (such as cystic fibrosis, celiac disease, or Kawasaki disease).

* * * * *

[FR Doc. 2013–17786 Filed 7–23–13; 8:45 am]

BILLING CODE 4165–15–P

Notices

Federal Register

Vol. 78, No. 142

Wednesday, July 24, 2013

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

July 19, 2013.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), 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. Comments regarding these information collections are best assured of having their full effect if received by August 23, 2013. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Housing Service

Title: Section 515 Multi-Family Housing Preservation and Revitalization Restructuring Demonstration Program (MPR).

OMB Control Number: 0575–0190.

Summary of Collection: The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006 (P.L. 109–97) provided funding for, and authorizes the Rural Housing Service (RHS) to conduct a demonstration program for the preservation and revitalization of the Section 515 multi-family housing portfolio. The Multi-Family Housing Preservation and Revitalization Restructuring Demonstration Program will utilize numerous authorities to provide the financial assistance necessary to revitalize rental properties and preserve them for affordable housing.

Need and Use of the Information: RHS will collect information from the proposer to evaluate the strengths and weaknesses to which the proposal concept possesses or lacks to select the most feasible proposals that will enhances the Agency's chances in accomplishing the demonstration objective. The information will be utilized to sustain and modify RHS' current policies pertaining to revitalization and preservation of affordable rental housing in rural areas.

Description of Respondents: Individuals or Households; Not-for-profit institutions; State, Local, or Tribal Government.

Number of Respondents: 2,420.

Frequency of Responses: Recordkeeping; Reporting: Annually.

Total Burden Hours: 2,720.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2013–17788 Filed 7–23–13; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Forest Resource Coordinating Committee

AGENCY: Forest Service, USDA.

ACTION: Notice; Re-establishment of the Forest Resource Coordinating Committee and call for nominations.

SUMMARY: The Department of Agriculture re-established the Forest Resource Coordinating Committee (Committee) pursuant to Section 8005 of the Food, Conservation, and Energy Act of 2008 (Act) (Pub. L. 110–246), and the Federal Advisory Committee Act (FACA), (5 U.S.C. App. 2). The Act passed into law as an amendment to the Cooperative Forestry Assistance Act of 1978 on June 18, 2008. The Committee has been re-established to continue coordinating non-industrial private forestry activities within the U.S. Department of Agriculture (USDA) and the private sector. The Secretary of Agriculture (Secretary) has determined that the work of the Committee is in the public's interest and relevant to the duties of the USDA. Therefore, the Secretary is seeking nominations to fill a vacancy and three expiring positions, with terms of 3 years, in the Conservation Organization, Forest Industry, Nonindustrial Private Forest Landowner, and Conservation District categories. The nominees must be associated with such organizations and be willing to represent that sector as it relates to non-industrial private forestry. The public is invited to submit nominations for membership on the Committee, either as a self-nomination or a nomination of any qualified and interested person.

DATES: Written nominations must be received by August 23, 2013. Nominations must contain a completed application packet that includes the nominee's name, resume, and completed Form AD–755 (Advisory Committee Membership Background Information).

ADDRESSES: The address to submit nominations will vary based upon delivery method. Nomination packages must be sent to the addresses below:

- Nominations sent via express mail or overnight courier service: Maya Solomon, USDA Forest Service, Cooperative Forestry Staff, 1621 North

Kent Street, RPE–9, mail stop 1123, Arlington, Virginia 22209.

• Nominations sent via the U.S. Postal Service must be sent to the following address: USDA Forest Service; Cooperative Forestry Staff, State & Private Forestry; mail stop 1123; 1400 Independence Avenue SW., Washington, DC 20250–1123.

FOR FURTHER INFORMATION CONTACT: Maya Solomon, Forest Resource Coordinating Committee Program Coordinator, Telephone: 202–205–1376 or Ted Beauvais, Designated Federal Officer, Telephone: 202–205–1190. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 5 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

In accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended (5 U.S.C., App. 2), the Secretary of Agriculture re-established the Committee. The purpose of the Committee is to continue providing direction and coordination of actions within the USDA, and coordination with State agencies and the private sector, to effectively address the national priorities for private forest conservation, with specific focus on owners of non-industrial private forest land as described in Section 8005 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246). These priorities include:

1. Conserving and managing working forest landscapes for multiple values and uses;
2. Protecting forests from threats, including catastrophic wildfires, hurricanes, tornadoes, windstorms, snow or ice storms, flooding, drought, invasive species, insect or disease outbreak, or development, and restoring appropriate forest types in response to such threats; and
3. Enhancing public benefits from private forests, including air and water quality, soil conservation, biological diversity, carbon storage, forest products, forestry-related jobs, production of renewable energy, wildlife, wildlife corridors and wildlife habitat, and recreation.

The Committee will continue meeting on at least an annual basis and its primary duties will include:

1. Providing direction and coordination of actions within the USDA, and coordination with State agencies and the private sector, to effectively address the national priorities, with specific focus on non-industrial private forest land;
2. Clarifying responsibilities of each agency represented on the Committee concerning the national priorities with specific focus on non-industrial private forest land;
3. Providing advice on the allocation of funds, including the competitive funds set-aside for Competitive Allocation of Funds Innovation Projects (Sections 8007 and 8008 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246)).

Advisory Committee Organization

The Committee is comprised of not more than 20 members. The members appointed to the Committee will be fair and balanced in terms of points of view represented, functions to be performed, and will represent a broad array of expertise and relevance to a membership category. The Committee members will serve staggered terms of up to 3 terms and meet annually, or as often as necessary at times as designated by the Designated Federal Officer (DFO). No individual who is currently registered as a Federal lobbyist is eligible to serve as a member of the Committee. The appointment of members to the Committee will be made by the Secretary. The Committee composition is as follows:

(a) Chief of the Forest Service;
(b) Chief of the Natural Resources Conservation Service;
(c) Director of the Farm Service Agency;
(d) Director of the National Institute of Food and Agriculture;
(e) Three State foresters or equivalent State officials from geographically diverse regions of the United States;
(f) A representative of a State fish and wildlife agency;
(g) Three owners of non-industrial private forest land;
(h) A forest industry representative;
(i) Three representatives from conservation organizations;
(j) A land-grant university or college representative;
(k) A private forestry consultant;
(l) A representative from a State Technical Committee;
(m) A representative of an Indian Tribe; and
(n) A representative from a Conservation District.

Vacancy

Representatives from the following categories will be appointed by the Secretary with terms of 3 years; Conservation Organization, Forestry Industry, Nonindustrial Private Forest Landowner, and Conservation District. Vacancies will be filled in the manner in which the original appointment was made.

Nomination and Application Instructions

The appointment of members to the Committee is made by the Secretary of Agriculture. Any individual or organization may nominate one or more qualified persons to represent the above vacancy on the Forest Resource Coordinating Committee. To be considered for membership, nominees must provide the following—

1. Résumé describing qualifications on how they are qualified to represent the unoccupied vacancy;
2. State why they want to serve on the committee and what they can contribute;
3. Show their past experience in working successfully as part of a coordinating group; and
4. Complete Form AD–755, Advisory Committee Membership Background Information. The form AD–755 may be obtained from the Forest Service contacts or from the following Web site: *http://www.usda.gov/documents/OCIO_AD_755_Master_2012.pdf*.
5. Letters of recommendation are welcome.

All nominations will be vetted by USDA. Individuals may also nominate themselves. A list of qualified applicants from which the Secretary of Agriculture shall appoint members to the Forest Resource Coordinating Committee will be prepared. Applicants are strongly encouraged to submit nominations via overnight mail or delivery to ensure timely receipt by the USDA. Members of the Committee will serve without compensation; however, the DFO may approve the reimbursement for travel expenses for the performance of duties on behalf of the Committee.

All appointments to the Committee will follow equal opportunity practices in accordance with USDA policies. Membership will include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, persons with disabilities, and senior citizen to ensure that the recommendations of the FRCC have taken into account the needs of the diverse groups served by the USDA.

Dated: July 16, 2013.

Gregory Parham,

Assistant Secretary for Administration, U. S. Department of Agriculture.

[FR Doc. 2013–17706 Filed 7–23–13; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2013–0050]

Notice of Request for Extension of Approval of an Information Collection; Veterinary Services Customer Service Survey

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection to evaluate service delivery by Veterinary Services to the public.

DATES: We will consider all comments that we receive on or before September 23, 2013.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2013-0050-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2013–0050, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2013-0050* or in our reading room, which is located in Room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the Veterinary Services customer service survey, contact Mr. Randy Snyder, Administrative Officer, VS, APHIS, 920 Main Campus Drive, Suite 200, Raleigh, NC 27606. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Veterinary Services Customer Service Survey.

OMB Number: 0579–0334.

Type of Request: Extension of approval of an information collection.

Abstract: The Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture, among other things, regulates and provides services related to the importation, interstate movement, and exportation of animals, animal products, and other articles to prevent the spread of pests and diseases of livestock. APHIS' Veterinary Services (VS) is the program unit that carries out these activities to protect animal health.

After performing a service for an individual or business, VS conducts a survey to evaluate its customer service. The survey consists of a short questionnaire in which respondents are asked to identify the type of customer they are (e.g., pet owners, farm owners, animal/animal product producer, animal importer/exporter), and then to rate the services received in terms of courtesy, timeliness, helpfulness, etc. Respondents are also asked to rate and provide comments concerning their overall experience. Completion of the questionnaire is voluntary and responses do not identify the individual respondent.

VS uses the information collected to identify areas in which VS can improve service delivery to the public and more efficiently meet the needs and expectations of customers.

We are asking Office of Management and Budget (OMB) to approve our use of this information collection activity for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.083 hours per response.

Respondents: Members of the public who receive services from Veterinary Services.

Estimated annual number of respondents: 2,500.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 2,500.

Estimated total annual burden on respondents: 208 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 18th day of July 2013.

Michael C. Gregoire,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–17806 Filed 7–23–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2010–0100]

Environmental Impact Statement; Proposed Cattle Fever Tick Control Barrier in South Texas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability of a draft environmental impact statement; request for comments.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared a draft environmental impact statement (DEIS) to analyze the effects that may result from installing game fencing as a barrier to keep animals that carry cattle fever ticks and southern cattle ticks out of areas which are free of them and which are beyond the permanent tick quarantine zone in South Texas. We are seeking public comment on the DEIS and our evaluation of the alternatives we have identified as they relate to potential effects on the human environment.

DATES: We will consider all comments that we receive on or before August 30, 2013.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2010-0100-0001.*

• *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2010–0100, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2010-0100* or in our reading Room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For questions related to the Cattle Fever Tick Eradication Program, contact Dr. Matthew T. Messenger, Staff Entomologist, Cattle Fever Tick Eradication Program Manager, Ruminant Health Programs, VS, APHIS, 4700 River Road Unit 43, Riverdale, MD 20737; (301) 851–3421. For questions related to the DEIS, contact Ms. Michelle Gray, Environmental Protection Specialist, Environmental and Risk Analysis Services, PPD, APHIS, 4700 River Road Unit 149, Riverdale, MD 20737; (301) 851–3146.

SUPPLEMENTARY INFORMATION:

Background

The Cattle Fever Tick Eradication Program is a cooperative effort between the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA) and the Texas Animal Health Commission. The program was established to eliminate bovine babesiosis, a severe and often fatal cattle disease, from the U.S. cattle population. Cattle fever ticks *Rhipicephalus* (*Boophilus*) *annulatus,* and southern cattle ticks (*R.* (*B.*) *microplus*) (collectively referred to as ''cattle fever ticks'') carry protozoan parasites that cause babesiosis. The disease and the cattle fever ticks were officially eradicated from the continental United States in 1943, with the exception of a permanent tick quarantine zone extending more than 500 miles along the Rio Grande from Del Rio to Brownsville, TX.

Efforts to control cattle fever ticks along the permanent tick quarantine zone include vigilant surveillance and inspection for tick-infested cattle and wildlife, acaricide dip or spray treatment of livestock (primarily cattle and horses), and pasture vacation (temporary removal of cattle from infected pastures) to help protect cattle from potential exposure to the pathogen that can be transmitted by cattle fever ticks. However, an increasing number of cattle fever tick outbreaks have occurred outside the permanent tick quarantine zone in four of the eight Texas counties through which the zone passes: Maverick, Starr, Webb, and Zapata. The increase in outbreaks is attributed to numerous factors, including the free movement of deer and stray livestock carrying cattle fever ticks across the U.S.-Mexico border and an increase in the overall deer population, which serves as a reservoir for the disease. These outbreaks, which cause lengthy quarantine restrictions and increased herd management efforts and expenses to cattle producers within the tick-free zone, prompted us to explore additional control methods for cattle fever ticks. Subsequently, we determined that game fencing could help prevent the spread of cattle fever ticks to U.S. cattle populations from free-ranging tick hosts, thereby serving as another tool towards cattle fever tick eradication and control efforts.

On February 15, 2011, we published in the **Federal Register** (76 FR 8709–8710, Docket No. APHIS–2010–0100) a notice of intent to prepare an environmental impact statement (EIS) to examine the potential environmental and health effects of erecting such fencing. We solicited comments for 30 days ending on March 17, 2011. We used the comments we received to help us develop the scope, potential alternatives, and environmental impacts or issues that should be considered for further examination in the draft EIS (DEIS). The action being considered by APHIS is whether to contribute funding toward installation of game fencing, with landowner consent and cost-share agreement, on privately owned property to prevent the spread of cattle fever ticks via the free movement of deer and other tick hosts into the permanent tick quarantine zone. In the DEIS, APHIS considered potential significant environmental effects on the quality of the human environment caused by contributing funding toward the installation of game fencing by landowners in Maverick, Starr, Webb, and Zapata Counties along the Permanent Tick Quarantine Line.

APHIS prepared this DEIS in accordance with (1) the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

We evaluated two alternatives in the DEIS:

Take no action. Under this alternative, APHIS would provide no funding toward the installation of game fencing to close gaps existing in game-fenced areas in Maverick County, TX, or in rural areas of Starr, Webb, and Zapata Counties, TX, to prevent the spread of cattle fever ticks via the free movement of white-tailed deer and other tick hosts into the permanent tick quarantine zone. This alternative represents the baseline against which a proposed action may be compared and involves no changes to the current situation.

Provide funding assistance to install game fencing in Maverick, Starr, Webb, and Zapata Counties, TX. Under this alternative, APHIS would contribute partial funding toward the installation of game fencing on privately owned property in rural locations in Maverick, Starr, Webb, and Zapata Counties, TX, only upon landowner agreement, where recurring cattle fever tick infestations are problematic. APHIS would be flexible and determine the most logical placement of game fencing on a landowner's property based upon the facts and circumstances of the particular situation and location. APHIS would not contribute funding toward game fencing that would be located in wetlands or that would obstruct arroyos or streams, nor would APHIS contribute funding toward fencing that would obstruct public or private access roads or driveways. Any APHIS agreement providing funds to a landowner would require concurrence with these conditions.

In the DEIS, we evaluated both alternatives for their impacts on soil, air quality, water quality, livestock health, human health and safety, vegetation, wildlife, and cultural, historic, and visual resources.

We welcome comments on all of the issues presented in the DEIS and particularly on issues related to the alternatives outlined above.

Done in Washington, DC, this 18th day of July 2013.

Michael C. Gregoire,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–17804 Filed 7–23–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

RIN 0596–AC73

Burned Area Emergency Response, Forest Service

AGENCY: Forest Service, USDA.

ACTION: Notice of interim directive; Correction and extension of comment period.

SUMMARY: The Forest Service is correcting a notice of interim directive that appeared in the **Federal Register** of June 6, 2013, (78 FR 34031). This correction adds the Web site that was inadvertently omitted from the interim directive which is necessary to allow the public more detailed information and time to review the Burned Area Emergency Response revisions. This correction lists the Web site for the interim directive and the current Forest Service Manual in the Supplementary Information section of this notice and extends the comment period by 30 days.

DATES: Comments must be received in writing by August 23, 2013.

ADDRESSES: Submit comments electronically through the internet Web site at *http:/www.regulations.gov* or mail written comments to U.S. Forest Service, Attn: Director, Watershed, Fish, Wildlife, Air and Rare Plants, Mail Stop 1121, 1400 Independence Ave. SW., Washington, DC 20250–1121. If comments are sent by electronic means, please do not send duplicate comments via regular mail.

All comments, including names and addresses when provided, will be place in the record and are available for public inspection and copying. Persons wishing to inspect the comments received on this interim directive may do so in the Office of the Director, Watershed, Fish, Wildlife, Air and Rare Plants, U.S. Forest Service, 1601 N. Kent Street, 5th Floor, Arlington, VA 22209, between 8:30 a.m. and 4:00 p.m. on business days. Those wishing to inspect comments are encouraged to call ahead at 202–205–1167 to facilitate access to the building.

FOR FURTHER INFORMATION CONTACT: Penny Luehring, Watershed, Fish Wildlife, Air and Rare Plants Staff, 333 Broadway SE., Albuquerque, NM 87102, 505–842–3141 or *pluehring@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: In the **Federal Register** of June 6, 2013, in FR Doc. 2013–13459, on page 34031, column 3, after the first paragraph and before the heading ''Summary of Revisions'' add the following: *http://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsm?2500.* Once this Web page has opened, click on ''wo id 2520–2013–1.doc'' and ''2520.doc''.

Dated: July 17, 2013.

Tim DeCosta,

Chief of Staff.

[FR Doc. 2013–17710 Filed 7–23–13; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and Opportunity for Public Comment

Pursuant to Section 251 of the Trade Act 1974, as amended (19 U.S.C. 2341 et seq.), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance 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

[7/12/2013 through 7/18/2013]

Firm name	Firm address	Date accepted for investigation	Product(s)
Suttle-Straus, Inc.	1000 Uniek Drive, Waunakee, WI 53597.	7/12/2013	Firm manufactures printed products such as catalogs and brochures.
Regal Ware, Inc.	1675 Reigle Dr, Kewaskum, WI 53040.	7/12/2013	Firm manufactures stainless steel cookware.
St. Marys Carbon Co., Inc.	259 Eberl Street, St. Marys, PA 15857.	7/17/2013	Firm manufactures carbon fiber products for the automotive and other industries.

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: July 18, 2013.

Michael DeVillo,

Eligibility Examiner.

[FR Doc. 2013–17827 Filed 7–23–13; 8:45 am]

BILLING CODE 3510–WH–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1907]

Reorganization of Foreign-Trade Zone 122 Under Alternative Site Framework; Corpus Christi, Texas

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 Port of Corpus Christi Authority, grantee of Foreign-Trade Zone 122, submitted an application to the Board (FTZ Docket B–15–2013, docketed 02/20/2013) for authority to reorganize under the ASF with a service area of Nueces, San Patricio, Aransas, Jim Wells, Kleberg and Bee Counties, Texas, within and adjacent to the Corpus Christi Customs and Border Protection port of entry, and FTZ 122's existing Site 1 would be categorized as a magnet site, existing Sites 3, 7 and 8 would be categorized as usage-driven sites, and existing Site 4 would be removed from the zone;

Whereas, notice inviting public comment was given in the **Federal Register** (78 FR 13015–13016, 02/26/2013) 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 122 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 three-year ASF sunset provision for usage-driven sites that would terminate authority for Sites 3, 7 and 8 if no foreign-status merchandise is admitted for a *bona fide* customs purpose by July 31, 2016.

Signed at Washington, DC, this 16th day of July 2013.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–17699 Filed 7–23–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Orville L. Parker, Jr., 2647 W. Walton Street, Chicago, IL 60622, Respondent; Order Relating to Orville L. Parker, Jr.

The Bureau of Industry and Security, U.S. Department of Commerce (''BIS''), has notified Orville L. Parker, Jr., of Chicago, Illinois (''Parker''), of its intention to initiate an administrative proceeding against Parker pursuant to Section 766.3 of the Export Administration Regulations (the ''Regulations''),[1] and Section 13(c) of the Export Administration Act of 1979, as amended (the ''Act''),[2] through the issuance of a Proposed Charging Letter to Parker that alleges that Parker committed two violations of the Regulations. Specifically, the charges are:

Charge 1 15 CFR 764.2(a): Engaging in Prohibited Conduct by Exporting a Thermal Imaging Camera Without the Required License

On or about February 29, 2008, Parker engaged in conduct prohibited by the Regulations by exporting a thermal imaging camera, an item subject to the Regulations, classified under Export Control Classification Number (''ECCN'') 6A003.b.4, controlled for Regional Stability reasons, and valued at approximately $4,050, from the United States to Germany without the Department of Commerce license required by Section 742.6(a)(1) of the Regulations. Parker stole the thermal imaging camera from his then-employer and subsequently advertised and then sold the item on eBay. In order to avoid detection by law enforcement, Parker intentionally used someone else's email address when he listed the item for sale on eBay while also falsely listing that the thermal imaging camera was physically located in Orlando, Florida. To further conceal his activities, Parker intentionally undervalued the thermal imaging camera at the time of export to avoid filing a Shipper's Export Declaration with the United States Government. In so doing, Parker committed one violation of Section 764.2(a) of the Regulations.

Charge 2 15 CFR 764.2(a): Engaging in Prohibited Conduct by Failing To File a Shipper's Export Declaration or Automated Export Systems Record

On or about February 29, 2008, in connection with the unlicensed export transaction described in Charge 1 above, Parker engaged in conduct prohibited by the Regulations when he failed to file a Shipper's Export Declaration (''SED'') or Automated Export System (''AES'') record with the U.S. Government. Pursuant to Section 758.1(b)(3) of the Regulations, an SED or AES record must be filed with the U.S. Government for all exports of commodities subject to the Regulations when the value of the commodity is over $2,500. Additionally, Section 758.1(b)(2) requires the filing of a SED or AES record for all exports subject to the Regulations that require submission of a license application, regardless of value or destination. Based on his experience filling out shipping air waybills Parker was aware that an SED or AES record was required for exports valued at over $2,500. Parker also knew the thermal imaging camera, which he had previously stolen from his then-employer, was valued at approximately $4,050. In order to avoid detection by law enforcement Parker intentionally undervalued the item to $2,400 in an attempt to avoid the SED/AES record filing requirement.

By failing to file the required SED or AES record, Parker committed one violation of Section 764.2(a) of the Regulations.

Whereas, BIS and Parker have entered into a Settlement Agreement pursuant to Section 766.18(a) of the Regulations, whereby they agreed to settle this matter in accordance with the terms and conditions set forth therein; and

Whereas, I have approved of the terms of such Settlement Agreement;

It is therefore ordered:

First, that for a period of ten (10) years from the date of this Order, Orville L. Parker, Jr., with a last known address of 2647 W. Walton Street, Chicago, IL 60622, and when acting for or on his behalf, his successors, assigns, representatives, agents, or employees (hereinafter collectively referred to as ''Denied Person''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2013). The charged violations occurred in 2008. The Regulations governing the violations at issue are found in the 2008 version of the Code of Federal Regulations (15 CFR parts 730–774). The 2013 Regulations set forth the procedures that apply to this matter.

[2] 50 U.S.C. app. §§ 2401–2420 (2000). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 15, 2012 (77 FR 49699 (Aug. 16, 2012)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*) (2006 & Supp. IV 2010).

Second, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, that, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to the Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of the Order.

Fourth, that the Proposed Charging Letter, the Settlement Agreement, and this Order shall be made available to the public.

Fifth, that this Order shall be served on Parker, and shall be published in the **Federal Register**.

This Order, which constitutes the final agency action in this matter, is effective immediately.

Issued: July 9, 2013.

David W. Mills,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2013–17824 Filed 7–23–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–849]

Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China: Preliminary Results of Antidumping Administrative Review; 2011–2012

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* July 24, 2013.

SUMMARY: The Department of Commerce (''Department'') is conducting an administrative review of the antidumping duty order on certain cut-to-length carbon steel plate (''CTL plate'') from the People's Republic of China (''PRC'') for the period of review (''POR'') November 1, 2011, through October 31, 2012. This review covers three PRC companies.[1] The Department preliminarily finds Hunan Valin did not have reviewable transactions during the POR. Further, the Department preliminarily finds that the other two respondents, Baosteel and Shanghai Pudong, did not establish their eligibility for separate rate status and, thus, are part of the PRC-wide entity.

FOR FURTHER INFORMATION CONTACT: Jeff Pedersen, 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) 482–2769.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The product covered by the order is certain cut-to-length carbon steel plate from the PRC.[2] This merchandise is currently classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') under item numbers 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7212.40.5000, 7212.50.0000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Methodology

The Department has conducted this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (''the Act''). For a full description of the methodology underlying our conclusions, *see* Preliminary Results Decision Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, dated concurrently with these results and hereby adopted by this notice. This 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 in the Central Records Unit, Room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Results Decision Memorandum can be accessed directly on the Internet at *http://www.trade.gov/ia/.* The signed Preliminary Results Decision Memorandum and the electronic versions of the Preliminary Results Decision Memorandum are identical in content.

Preliminary Results of Review

The Department preliminarily determines that Hunan Valin did not have reviewable transactions during the POR and that Baosteel and Shanghai Pudong, did not establish their eligibility for separate rate status and, thus, are part of the PRC-wide entity.

Disclosure and Public Comment

Interested parties are invited to comment on the preliminary results and may submit case briefs and/or written comments within 30 days of the date of publication of this notice, pursuant to 19 CFR 351.309(c)(1)(ii). Rebuttal briefs, limited to issues raised in the case briefs, will be due five days after the due date for case briefs, pursuant to 19 CFR 351.309(d). Parties who submit

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[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 77 FR 77017 (December 31, 2012). The companies under review are as follows: Hunan Valin Xiangtan Iron & Steel Co., Ltd. (''Hunan Valin''), Shanghai Pudong Iron and Steel Co. (''Shanghai Pudong''), and the company grouping Bao/Baoshan Iron and Steel Corp., Baoshan International Trade Corp. and Bao Steel Metals Trading Corp. (''Baosteel'').

[2] *See* Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China issued concurrently with this notice for a complete description of the Scope of the Order (''Preliminary Results Decision Memorandum'').

case or rebuttal briefs in this proceeding are requested to submit with each argument a statement of the issue, a summary of the argument not to exceed five pages, and a table of statutes, regulations, and cases cited, in accordance with 19 CFR 351.309(c)(2).

Pursuant to 19 CFR 351.310(c), interested parties, who wish to request a hearing, or to participate in a hearing if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, filed electronically using IA ACCESS. An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5:00 p.m. Eastern Standard Time, within 30 days after the date of publication of this notice.[3] Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those issues raised in the respective case briefs. If a request for a hearing is made, parties will be notified of the time and date of the hearing which will be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington DC 20230. The Department intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

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 covered by this review.[4] The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. The Department intends to instruct CBP to liquidate entries of subject merchandise from Baosteel and Shanghai Pudong at the PRC-wide rate of 128.59 percent. Additionally, pursuant to a recently announced refinement to its assessment practice in NME cases, if the Department continues to determine that an 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 PRC-wide rate. For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of review, as provided by section 751(a)(2)(C) of the Act: (1) For Hunan Valin, which had no shipments, the cash deposit rate will remain unchanged from the rate assigned to this company in the most recently completed review of the company; (2) for previously investigated or reviewed PRC and non-PRC exporters who are not under review in this segment of the proceeding but which have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (2) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, including Baosteel and Shanghai Pudong, the cash deposit rate will be the PRC-wide rate of 128.59 percent; and (3) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter(s) that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary 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 review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213.

[3] *See* 19 CFR 351.310(c).

[4] *See* 19 CFR 351.212(b)(1).

Dated: July 15, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

Appendix

List of Topics Discussed in the Preliminary Results Decision Memorandum

1. Preliminary Determination of No Shipments for Hunan Valin
2. Treatment of Baosteel and Shanghai Pudong
3. Separate Rates

[FR Doc. 2013–17796 Filed 7–23–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–855, A–549–831]

Steel Threaded Rod From India and Thailand: Initiation of Antidumping Duty Investigations

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* July 24, 2013.

FOR FURTHER INFORMATION CONTACT: Laurel LaCivita or Paul Stolz (India); Raquel Silva or Joy Zhang (Thailand) at (202) 482–4243, (202) 482–4474, (202) 482–6475, or (202) 482–1168, respectively, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

The Petitions

On June 27, 2013, the Department of Commerce (the ''Department'') received antidumping duty (''AD'') petitions concerning imports of steel threaded rod from India and Thailand filed in proper form on behalf of All America Threaded Products Inc.; Bay Standard Manufacturing Inc.; and Vulcan Threaded Products Inc. (''Vulcan'') (collectively, ''Petitioners'').[1] Petitioners are domestic producers of steel threaded rod. On July 2 and 3, 2013, the Department requested additional information and clarification of certain areas of the Petitions.[2] Petitioners filed

[1] *See* Petitions for the Imposition of Antidumping Duties on Steel Threaded Rod from India and Thailand and the Imposition of Countervailing Duties on Steel Threaded Rod from India, dated June 27, 2013 (''the Petitions'').

[2] *See* letters from the Department, ''Petition for the Imposition of Antidumping Duties on Imports of Steel Threaded Rod from India: Supplemental Questions,'' dated July 2, 2012; ''Petitions for the Imposition of Antidumping Duties on Imports of

responses to these requests on July 8 and 9, 2013.[3]

In accordance with section 732(b) of the Tariff Act of 1930, as amended (the ''Act''), Petitioners allege that imports of steel threaded rod from India and Thailand are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act and that such imports are materially injuring, or threatening material injury to, an industry in the United States. Also, consistent with section 732(b)(1) of the Act, the Petitions are accompanied by information reasonably available to Petitioners supporting their allegations.

The Department finds that Petitioners filed these Petitions on behalf of the domestic industry because Petitioners are interested parties as defined in section 771(9)(C) of the Act. The Department also finds that Petitioners have demonstrated sufficient industry support with respect to the initiation of the AD investigations that Petitioners are requesting. *See* the ''Determination of Industry Support for the Petitions'' section below.

Period of Investigation

Because the Petitions were filed on June 27, 2013, the period of investigation (''POI'') for the India and Thailand investigations is April 1, 2012, through March 31, 2013.[4]

Scope of the Investigations

The product covered by these investigations is steel threaded rod from India and Thailand. For a full description of the scope of the investigations, *see* the ''Scope of the Investigations,'' in the Appendix of this notice.

Comments on Scope of Investigations

During our review of the Petitions, we discussed the scope with Petitioners to ensure that it is an accurate reflection of the product for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the regulations,[5] we are setting aside a period for interested parties to raise issues regarding product coverage. The Department encourages all interested parties to submit such comments by 5:00 p.m. Eastern Daylight Time on Tuesday, August 6, 2013, which is 20 calendar days from the signature date of this notice.

All comments must be filed on the record of both the India and the Thailand AD investigations. All comments and submissions to the Department must be filed electronically using Import Administration's Antidumping Countervailing Duty Centralized Electronic Service System (''IA ACCESS'').[6] An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by the time and date noted above. Documents excepted from the electronic submission requirements must be filed manually (*i.e.,* in paper form) with Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, and stamped with the date and time of receipt by the deadline noted above.

The period of scope comments is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determinations.

Comments on Product Characteristics for Antidumping Questionnaires

The Department requests comments from interested parties regarding the appropriate physical characteristics of steel threaded rod to be reported in response to the Department's AD questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to report the relevant factors and costs of production accurately as well as to develop appropriate product-comparison criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate list of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as: (1) General product characteristics and (2) product-comparison criteria. We note that it is not always appropriate to use all product characteristics as product-comparison criteria. We base product-comparison criteria on meaningful commercial differences among products. In other words, while there may be some physical product characteristics utilized by manufacturers to describe steel threaded rod, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in matching products. Generally, the Department attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the AD questionnaires, we must receive comments on product characteristics by August 16, 2013. Rebuttal comments must be received by August 26, 2013. All comments and submissions to the Department must be filed electronically using IA ACCESS, as referenced above.

Determination of Industry Support for the Petitions

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the industry.

Steel Threaded Rod from Thailand and India and Countervailing Duties on Imports of Steel Threaded Rod from India: Supplemental Questions,'' dated July 2, 2013; and, ''Petition for the Imposition of Antidumping Duties on Imports of Steel Threaded Rod from Thailand: Supplemental Questionnaire,'' July 3, 2013.

[3] *See* Antidumping Investigation of Steel Threaded Rod from Thailand and Antidumping and Countervailing Duty Investigations of Steel Threaded Rod from India—Petitioners' Response to Supplemental Questions (Volume I: General Issues and Injury Information), dated July 8, 2013 (''General Issues Supplement''), Antidumping Investigation of Steel Threaded Rod from India—Petitioners' Response to Supplemental Questions (Volume III: Antidumping—India), dated July 8, 2013, and Antidumping Investigation of Steel Threaded Rod from Thailand—Petitioners' Response to Supplemental Questions (Volume II: Antidumping—Thailand), dated July 9, 2013.

[4] *See* 19 CFR 351.204(b)(1).

[5] *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[6] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011) for details of the Department's electronic filing requirements, which went into effect on August 5, 2011. Information on help using IA ACCESS can be found at *https://iaaccess.trade.gov/help.aspx* and a handbook can be found at *https://iaaccess.trade.gov/help/Handbook%20on%20Electronic%20Filling%20Procedures.pdf.*

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product,[7] they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[8]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, Petitioners do not offer a definition of domestic like product distinct from the scope of the investigations. Based on our analysis of the information submitted on the record, we have determined that steel threaded rod constitutes a single domestic like product and we have analyzed industry support in terms of that domestic like product.[9]

In determining whether Petitioners have standing under section 732(c)(4)(A) of the Act, we considered the industry support data contained in the Petitions with reference to the domestic like product as defined in the ''Scope of Investigations'' section above. To establish industry support, Petitioners provided their production of the domestic like product in 2012, and compared this to the estimated total production of the domestic like product for the entire domestic industry.[10] Petitioners estimated 2012 production of the domestic like product by non-petitioning companies based on their knowledge of the industry. We have relied upon data Petitioners provided for purposes of measuring industry support.[11]

Based on information provided in the Petitions, supplemental submissions, and other information readily available to the Department, we determine that Petitioners have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product.[12] Based on information provided in the Petitions and other submissions, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions. Accordingly, the Department determines that the Petitions were filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act.[13]

The Department finds that Petitioners filed the Petitions on behalf of the domestic industry because they are interested parties as defined in section 771(9)(C) of the Act and they have demonstrated sufficient industry support as required under section 732(c)(4)(A), with respect to the AD investigations that they are requesting the Department initiate.[14]

Allegations and Evidence of Material Injury and Causation

Petitioners allege that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at less than normal value (''NV''). In addition, Petitioners allege that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[15]

Petitioners contend that the industry's injured condition is illustrated by reduced market share; increased import penetration; underselling and price depression or suppression; lost sales and revenues; low capacity utilization; stagnant employment-related variables; and decline in financial performance.[16] We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation.[17]

Allegations of Sales at Less Than Fair Value

The following is a description of the allegations of sales at less-than-fair-value upon which the Department based its decision to initiate investigations of imports of steel threaded rod from India and Thailand. The sources of data for the deductions and adjustments relating to U.S. price and NV are discussed in greater detail in the India AD Initiation Checklist and the Thailand AD Initiation Checklist.

Export Price

India

Petitioners calculated export price (''EP'') based on lost U.S. sales and offers for sale for major types of steel threaded rod for delivery to the U.S. customer during the POI. To derive the ex-factory price, Petitioners made deductions to U.S. price for domestic brokerage and handling, international freight, distributor markup, and discounts/rebates, as appropriate, based on the stated sales and delivery terms.[18] Petitioners estimated international freight and distributor markups based on their knowledge and experience. Petitioners calculated domestic brokerage and handling using 2012 average charges (inclusive of document fees, terminal handling and port

[7] *See* section 771(10) of the Act.

[8] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

[9] *See* Antidumping Duty Investigation Initiation Checklist: Steel Threaded Rod from India (''India AD Initiation Checklist''), at Attachment II, Analysis of Industry Support for the Petitions Covering Steel Threaded Rod from India and Thailand (''Attachment II'') and Antidumping Duty Investigation Initiation Checklist: Steel Threaded Rod from Thailand (''Thailand AD Initiation Checklist''), at Attachment II. These checklists are dated concurrently with this notice and on file electronically via IA ACCESS. Access to documents filed via IA ACCESS is also available in the Central Records Unit (''CRU''), Room 7046 of the main Department of Commerce building.

[10] *See* Volume I of the Petitions, at I–4 through I–6, and Exhibit I–1.

[11] *See* India AD Initiation Checklist and Thailand AD Initiation Checklist, at Attachment II.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *See* Volume I of the Petitions, at I–15 and I–16 and Exhibit I–7.

[16] *Id.,* at I–15 through I–29 and Exhibits I–5 through I–7 and I–10 through I–16; *see also* General Issues Supplement, at (Supp I)–4 through (Supp I)–7 and Attachments (Supp I)–6 through (Supp I)–10.

[17] *See* India AD Initiation Checklist, at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Petitions Covering Steel Threaded Rod from India and Thailand (''Attachment III''); *see also* Thailand AD Initiation Checklist, at Attachment III.

[18] *See* India AD Initiation Checklist.

charges, and customs clearance charges) for exports from India, as published in *Doing Business in India* by the World Bank. Petitioners calculated discounts/rebates based on the terms of an offer for sale.

Thailand

Petitioners calculated EP based on lost U.S. sales and offers for sale for major types of steel threaded rod for delivery to the U.S. customer during the POI. Based on the stated sales and delivery terms, Petitioners deducted from the U.S. price domestic brokerage and handling, international freight, U.S. inland freight, and distributor mark-up, where appropriate.[19]

Petitioners estimated international freight and U.S. inland freight based on their own knowledge and experience regarding shipments of full containers from Thailand to the West Coast and from a West Coast port to the buyer's location. Petitioners calculated domestic brokerage and handling using 2012 average charges (inclusive of document fees, terminal handling and port charges, and customs clearance charges) for exports from Thailand, as published in *Doing Business in Thailand* by the World Bank. Petitioners estimated distributor mark-up based on their knowledge and experience.

Normal Value

India

Petitioners provided home market prices for steel threaded rod in India. These prices were adjusted to exclude distributor mark-up, where appropriate.[20]

Sales-Below-Cost Allegation

Petitioners provided information demonstrating reasonable grounds to believe or suspect that sales of steel threaded rod in the Indian market were made at prices below the fully-absorbed cost of production (''COP''), within the meaning of section 773(b) of the Act, and requested that the Department conduct a country-wide sales-below-cost investigation. The Statement of Administrative Action (''SAA'') accompanying the Uruguay Round Agreements Act states that an allegation of sales below COP need not be specific to individual exporters or producers.[21] The SAA states that ''Commerce will consider allegations of below-cost sales in the aggregate for a foreign country, just as Commerce currently considers allegations of sales at less than fair value on a country-wide basis for purposes of initiating an antidumping investigation.''[22]

Further, the SAA provides that section 773(b)(2)(A) of the Act retains the requirement that the Department have ''reasonable grounds to believe or suspect'' that below-cost sales have occurred before initiating such an investigation. Reasonable grounds exist when an interested party provides specific factual information on costs and prices, observed or constructed, indicating that sales in the foreign market in question are at below-cost prices.[23]

Cost of Production

Pursuant to section 773(b)(3) of the Act, COP consists of the cost of manufacturing (''COM''); selling, general and administrative (''SG&A'') expenses; financial expenses; and packing expenses. Petitioners calculated COM (except factory overhead) and packing expenses based on the input quantities of Vulcan's Pelham facility adjusted for known differences, during the anticipated POI, multiplied by the value of the inputs used to manufacture threaded rod in India using publicly-available data. Petitioners used their actual tolling costs of zinc coating and hot-dip galvanization because Petitioners did not perform these processes in-house.

To determine factory overhead, SG&A, and financial expense rates, Petitioners relied on the fiscal year (''FY'') ended March 31, 2013 financial statements of an Indian producer of comparable merchandise.[24]

Based upon a comparison of the prices of the foreign like product in the home market to the calculated COP of the most comparable product, we find reasonable grounds to believe or suspect that sales of the foreign like product were made below the COP, within the meaning of section 773(b)(2)(A)(i) of the Act. Accordingly, the Department is initiating a country-wide cost investigation.

Normal Value Based on Constructed Value (''CV'')

Because they alleged sales below cost, pursuant to sections 773(a)(4), 773(b) and 773(e) of the Act, Petitioners calculated NV based on CV. Petitioners calculated CV using the same average COM, SG&A, financial expense, and packing figures used to compute the COP. Petitioners relied on the same FY ended March 31, 2013, audited unconsolidated financial statements used as the basis for the factory overhead, SG&A, and financial expense rates to calculate the profit rate.[25]

Thailand

Petitioners based NV on CV, as neither a home market nor a third-country price was reasonably available. Pursuant to section 773(e) of the Act, CV consists of the COM; SG&A expenses; financial expenses; packing expenses; and profit. Petitioners calculated COM (except factory overhead) and packing expenses based on the input quantities of Vulcan's Pelham facility adjusted for known differences, during the anticipated POI, multiplied by the value of the inputs used to manufacture threaded rod in Thailand using publicly-available data. Petitioners used their actual tolling costs of zinc coating and hot-dip galvanization because Petitioners did not perform these processes in-house.

To determine factory overhead, SG&A, and financial expense rates, Petitioners relied on the FY ended December 31, 2011 financial statements of a Thai producer of comparable merchandise. Petitioners relied on the same FY ended December 31, 2011 financial statements used as the basis for the factory overhead, SG&A, and financial expense rates to calculate the profit rate.[26]

Fair Value Comparisons

Based on the data provided by Petitioners, there is reason to believe that imports of threaded rod from India and Thailand are being, or are likely to be, sold in the United States at less than fair value. Based on comparisons of EP to CV in accordance with section 773(a)(4) of the Act, the estimated dumping margins for threaded rod from India and Thailand range from from 17.93–119.87 percent,[27] and 63.16–74.90 percent,[28] respectively.

Initiation of Antidumping Investigations

Based upon the examination of the Petitions on steel threaded rod from India and Thailand, we find that the Petitions meet the requirements of section 732 of the Act. Therefore, we are initiating AD investigations to determine whether imports of steel threaded rod from India and Thailand are being, or are likely to be, sold in the United States at less than fair value. In accordance with section 733(b)(1)(A) of the Act and 19 CFR 351.205(b)(1),

[19] *See* Thailand AD Initiation Checklist.

[20] *See* India AD Initiation Checklist.

[21] *See* SAA, H.R. Doc. No. 103–316 at 833 (1994).

[22] *Id.*

[23] *Id.*

[24] *See* India AD Initiation Checklist.

[25] *See* India AD Initiation Checklist.

[26] *See* Thailand AD Initiation Checklist.

[27] *See* India AD Initiation Checklist.

[28] *See* Thailand AD Initiation Checklist.

unless postponed, we will make our preliminary determinations no later than 140 days after the date of this initiation.

Respondent Selection

Following standard practice in AD investigations involving market economy countries, in the event the Department determines that the number of known exporters or producers for this investigation is large, the Department may select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports of threaded rod from India or Thailand under *Harmonized Tariff Schedule of the United States* subheadings 7318.15.5051, 7318.15.5056, 7318.15.5090 and 7318.15.2095. We intend to release the CBP data under Administrative Protective Order (''APO'') to all parties with access to information protected by APO within five days of publication of this **Federal Register** notice.

The Petitions identified 69 producers and/or exporters of steel threaded rod in India,[29] and 18 producers and/or exporters of steel threaded rod in Thailand.[30]

We intend to make our decision regarding respondent selection within 20 days of publication of this notice. The Department invites comments regarding the CBP data and respondent selection within seven days of publication of this **Federal Register** notice for India and Thailand.

Distribution of Copies of the Petitions

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public version of the Petitions have been provided to the Governments of India and Thailand via IA ACCESS. To the extent practicable, we will attempt to provide a copy of the public version of the Petitions to each exporter named in the Petitions, as provided under 19 CFR 351.203(c)(2).

ITC Notification

We have notified the ITC of our initiation, as required by section 732(d) of the Act.

Preliminary Determinations by the ITC

The ITC will preliminarily determine no later than August 12, 2013, whether there is a reasonable indication that imports of steel threaded rod from India and Thailand are materially injuring or threatening material injury to a U.S. industry. A negative ITC determination for any country will result in the investigation being terminated with respect to that country; otherwise, these investigations will proceed according to statutory and regulatory time limits.

Submission of Factual Information

On April 10, 2013, the Department published *Definition of Factual Information and Time Limits for Submission of Factual Information: Final Rule,* 78 FR 21246 (April 10, 2013), which modified two regulations related to AD and countervailing duty (''CVD'') proceedings: The definition of factual information (19 CFR 351.102(b)(21)), and the time limits for the submission of factual information (19 CFR 351.301). The final rule identifies five categories of factual information in 19 CFR 351.102(b)(21), which are summarized as follows: (i) Evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by the Department; and (v) evidence other than factual information described in (i)–(iv). The final rule requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. The final rule also modified 19 CFR 351.301 so that, rather than providing general time limits, there are specific time limits based on the type of factual information being submitted. These modifications are effective for all proceeding segments initiated on or after May 10, 2013, and thus are applicable to these investigations. Please review the final rule, available at *http://ia.ita.doc.gov/frn/2013/1304frn/2013-08227.txt,* prior to submitting factual information in these investigations.

Notification to Interested Parties

Interested parties must submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008). Parties wishing to participate in these investigations should ensure that they meet the requirements of these procedures (*e.g.,* the filing of letters of appearance as discussed at 19 CFR 351.103(d)).

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[31] Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives in all segments of any AD or CVD proceedings initiated on or after March 14, 2011.[32] The formats for the revised certifications are provided at the end of the *Interim Final Rule*. The Department intends to reject factual submissions in any proceeding segments initiated on or after March 14, 2011, if the submitting party does not comply with the revised certification requirements.

This notice is issued and published pursuant to section 777(i) of the Act and 19 CFR 351.203(c).

Dated: July 17, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

Appendix

Scope of the Investigations

The merchandise covered by these investigations is steel threaded rod. Steel threaded rod is certain threaded rod, bar, or studs, of carbon quality steel, having a solid, circular cross section, of any diameter, in any straight length, that have been forged, turned, cold-drawn, cold-rolled, machine straightened, or otherwise cold-finished, and into which threaded grooves have been applied. In addition, the steel threaded rod, bar, or studs subject to these investigations are nonheaded and threaded along greater than 25 percent of their total length. A variety of finishes or coatings, such as plain oil finish as a temporary rust protectant, zinc coating (*i.e.,* galvanized, whether by electroplating or hot-dipping), paint, and other similar finishes and coatings, may be applied to the merchandise.

Included in the scope of these investigations are steel threaded rod, bar, or studs, in which: (1) Iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

- 1.80 percent of manganese, or
- 1.50 percent of silicon, or

[29] *See* Volume I of the Petitions at Exhibit I–5.

[30] *Id.,* at Exhibit I–6.

[31] *See* section 782(b) of the Act.

[32] *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Interim Final Rule,* 76 FR 7491 (February 10, 2011) (''*Interim Final Rule*'') amending 19 CFR 351.303(g)(1) & (2) and supplemented by *Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings: Supplemental Interim Final Rule,* 76 FR 54697 (September 2, 2011).

- 1.00 percent of copper, or
- 0.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or
- 1.25 percent of nickel, or
- 0.30 percent of tungsten, or
- 0.012 percent of boron, or
- 0.10 percent of molybdenum, or
- 0.10 percent of niobium, or
- 0.41 percent of titanium, or
- 0.15 percent of vanadium, or
- 0.15 percent of zirconium.

Steel threaded rod is currently classifiable under subheadings 7318.15.5051, 7318.15.5056, 7318.15.5090 and 7318.15.2095 of the *Harmonized Tariff Schedule of the United States* (''HTSUS''). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Excluded from the scope of these investigations are: (a) Threaded rod, bar, or studs which are threaded only on one or both ends and the threading covers 25 percent or less of the total length; and (b) threaded rod, bar, or studs made to American Society for Testing and Materials (''ASTM'') A193 Grade B7, ASTM A193 Grade B7M, ASTM A193 Grade B16, and ASTM A320 Grade L7.

[FR Doc. 2013–17794 Filed 7–23–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Corporation for Travel Promotion (dba Brand USA)

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an opportunity for travel and tourism industry leaders to apply for membership on the Board of Directors of the Corporation for Travel Promotion.

SUMMARY: The Department of Commerce is currently seeking applications from travel and tourism leaders from specific industries for membership on the Board of Directors (Board) of the Corporation for Travel Promotion (dba Brand USA). The purpose of the Board is to guide the Corporation for Travel Promotion on matters relating to the promotion of the U.S. travel and tourism industry, among other tasks.

ADDRESSES: Electronic applications may be sent to: *CTPBoard@trade.gov.* Written applications can be submitted Isabel Hill, Director, Office of Travel and Tourism Industries, U.S. Department of Commerce, Room 4043, 1401 Constitution Avenue NW., Washington, DC 20230. Telephone: 202.482.5120. Email: *Isabel.Hill@trade.gov.*

DATES: All applications must be received by the Office of Advisory Committees by close of business on August 9, 2013.

FOR FURTHER INFORMATION CONTACT: Julie Heizer, Deputy Director, Office of Travel and Tourism Industries, Room 10003, 1401 Constitution Avenue NW., Washington, DC 20230. Telephone: 202.482.4904. Email: *julie.heizer@trade.gov.*

SUPPLEMENTARY INFORMATION:

Background: The Travel Promotion Act of 2009 (TPA) was signed into law by President Obama on March 4, 2010. The TPA established the Corporation for Travel Promotion (the Corporation), as a non-profit corporation charged with the development and execution of a plan to (A) provide useful information to those interested in traveling to the United States; (B) identify and address perceptions regarding U.S. entry policies; (C) maximize economic and diplomatic benefits of travel to the United States through the use of various promotional tools; (D) ensure that international travel benefits all States and the District of Columbia, and (E) identify opportunities to promote tourism to rural and urban areas equally, including areas not traditionally visited by international travelers.

The Corporation is governed by a board of directors, consisting of 11 members with knowledge of international travel promotion and marketing, broadly representing various regions of the United States. The TPA directs the Secretary of Commerce (after consultation with the Secretary of Homeland Security and the Secretary of State) to appoint the board of directors for the Corporation.

At this time, the Department will be selecting four individuals with the appropriate expertise and experience from specific sectors of the travel and tourism industry to serve on the Board as follows:

(A) 1 shall have appropriate expertise and experience in the attractions or recreations sector;

(B) 1 shall have appropriate expertise and experience in the passenger air sector;

(C) 1 shall have appropriate expertise and experience in immigration law and policy, including visa requirements and United States entry procedures; and

(D) 1 shall have appropriate expertise in the inter-city passenger railroad business.

To be eligible for Board membership, one must have international travel and tourism marketing experience and must also be a U.S. citizen. In addition, individuals cannot be federally registered lobbyists or registered as a foreign agent under the Foreign Agents Registration Act of 1938, as amended.

Those selected for the Board must be able to meet the time and effort commitments of the Board. Priority may be given to individuals with experience as a Chief Executive Officer or President (or comparable level of responsibility) of an organization or entity in the travel and tourism sector in the United States.

Board members serve at the discretion of the Secretary of Commerce (who may remove any member of the Board for good cause). The terms of office of each member of the Board appointed by the Secretary shall be 3 years. Board members can serve a maximum of two consecutive full three-year terms. Board members are not considered Federal government employees by virtue of their service as a member of the Board and will receive no compensation from the Federal government for their participation in Board activities. Members participating in Board meetings and events will be paid actual travel expenses and per diem when away from their usual places of residence.

To be considered for membership, please provide the following:

1. Name, title, and personal resume of the individual requesting consideration; and

2. A brief statement of why the person should be considered for membership on the Board. This statement should also address the individual's relevant international travel and tourism marketing experience and indicate clearly the sector or sectors enumerated above in which the individual has the requisite expertise and experience. Individuals who have the requisite expertise and experience in more than one sector can be appointed for only one of those sectors. Appointments of members to the Board will be made by the Secretary of Commerce.

Dated: July 17, 2013.

Isabel Hill,

Director, Office of Travel and Tourism Industries.

[FR Doc. 2013–17791 Filed 7–19–13; 4:15 pm]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–856]

Steel Threaded Rod From India: Initiation of Countervailing Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* July 24, 2013.

FOR FURTHER INFORMATION CONTACT: Brooke Kennedy, 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) 482–3818.

SUPPLEMENTARY INFORMATION:

The Petition

On June 27, 2013, the Department of Commerce (''Department'') received a countervailing duty (''CVD'') petition concerning imports of steel threaded rod from India, filed in proper form by All America Threaded Products Inc., Bay Standard Manufacturing, Inc., and Vulcan Threaded Products Inc., (collectively hereinafter ''Petitioners'').[1] Petitioners are domestic producers of steel threaded rod. On July 2, and July 3, 2013, the Department requested additional information and clarification of certain areas of the Petition. Petitioners provided timely information supplementing the Petition on July 8, and July 9, 2013.[2]

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (''the Act''), Petitioners allege that manufacturers, producers, or exporters of steel threaded rod from India receive countervailable subsidies within the meaning of sections 701 and 771(5) of the Act, and that such imports are materially injuring, or threatening material injury to, the domestic industry producing steel threaded rod in the United States. Also, consistent with section 702(b)(1) of the Act, the Petition is accompanied by information reasonably available to Petitioners supporting their allegations.

The Department finds that Petitioners filed the Petition on behalf of the domestic industry because they are interested parties as defined in section 771(9)(C) of the Act. The Department also finds that Petitioners have demonstrated sufficient industry support with respect to the investigation that Petitioners request the Department initiate.[3]

Period of Investigation

The period of investigation is January 1, 2012, through December 31, 2012.

Scope of the Investigation

The product covered by this investigation is steel threaded rod from India. For a full description of the scope of the investigation, *see* the ''Scope of the Investigation'' in Appendix I to this notice.

Comments on Scope of Investigation

During our review of the Petition, the Department had discussions pertaining to the proposed scope with Petitioners to ensure that the scope language in the Petition was an accurate reflection of the products for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the regulations,[4] we are setting aside a period of time for interested parties to raise issues regarding product coverage. This period for scope comments is intended to provide the Department with ample opportunity to consider all issues and to consult with parties prior to the issuance of the preliminary determinations. The Department encourages interested parties to submit such comments by 5:00 p.m. Eastern Daylight Time on Tuesday, August 6, 2013, which is 20 calendar days from the signature date of this notice.

All submissions to the Department must be filed electronically using Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by the time and date set by the Department. Documents excepted from the electronic submission requirements must be filed manually (*i.e.,* in paper form) with the Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, and stamped with the date and time of receipt by the deadline established by the Department.[5]

The period of scope comments is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determination.

Consultations

Pursuant to section 702(b)(4)(A)(ii) of the Act, the Department invited representatives of the Government of India (''GOI'') for consultations with respect to the Petition.

The GOI did not accept our invitation to hold consultations before the initiation. All memoranda are on file electronically via IA ACCESS. Access to IA ACCESS is available in the Central Records Unit (''CRU''), Room 7046, of the main Department of Commerce Building.

Determination of Industry Support for the Petition

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the industry.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a

[1] *See* Petitions for the Imposition of Antidumping Duties on Steel Threaded Rod from India and Thailand and the Imposition of Countervailing Duties on Steel Threaded Rod from India, dated June 27, 2013, (''the Petition'').

[2] *See* Antidumping Investigation of Steel Threaded Rod from Thailand and Antidumping and Countervailing Duty Investigations of Steel Threaded Rod from India—Petitioners' Response to Supplemental Questions (Volume I: General Issues and Injury Information), dated July 8, 2013 (''General Issues Supplement''), and Countervailing Duty Investigation (''CVD'') of Steel Threaded Rod from India—Petitioners' Response to Supplemental Questions (Volume IV: CVD—India), dated July 9, 2013.

[3] *See* ''Determination of Industry Support for the Petition'' below.

[4] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011) (available at *http://www.gpo.gov/fdsys/pkg/FR-2011-07-06/pdf/2011-16352.pdf*) for details of the Department's Electronic Filing Requirements, which went into effect on August 5, 2011. Information on help using IA ACCESS can be found at *https://iaaccess.trade.gov/help.aspx* and a handbook can be found at *https://iaaccess.trade.gov/help/Handbook%20on%20Electronic%20Filing%20Procedures.pdf.*

whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product,[6] they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[7]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, Petitioners do not offer a definition of domestic like product distinct from the scope of the investigation. Based on our analysis of the information submitted on the record, we have determined that steel threaded rod constitutes a single domestic like product and we have analyzed industry support in terms of that domestic like product.[8]

In determining whether Petitioners have standing under section 702(c)(4)(A) of the Act, we considered the industry support data contained in the Petition with reference to the domestic like product as defined in the ''Scope of Investigation'' section above.

[6] *See* section 771(10) of the Act.

[7] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

[8] *See* Countervailing Duty Investigation Initiation Checklist: Steel Threaded Rod from India (''India CVD Initiation Checklist''), at Attachment II, Analysis of Industry Support for the Petitions Covering Steel Threaded Rod from India and Thailand (''Attachment II''). This checklist is dated concurrently with this notice and is on file electronically via IA ACCESS. Access to documents filed via IA ACCESS is also available in the CRU, Room 7046 of the main Department of Commerce building.

To establish industry support, Petitioners provided their production of the domestic like product in 2012, and compared this to the estimated total production of the domestic like product for the entire domestic industry.[9] Petitioners estimated 2012 production of the domestic like product by non-petitioning companies based on their knowledge of the industry. We have relied upon data Petitioners provided for purposes of measuring industry support.[10]

Based on information provided in the Petition, supplemental submission, and other information readily available to the Department, we determine that Petitioners have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petition account for at least 25 percent of the total production of the domestic like product.[11] Based on information provided in the Petition and other submissions, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition. Accordingly, the Department determines that the Petition was filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act.[12]

The Department finds that Petitioners filed the Petition on behalf of the domestic industry because they are interested parties as defined in section 771(9)(C) of the Act and they have demonstrated sufficient industry support with respect to the CVD investigation that they are requesting the Department initiate.[13]

Injury Test

Because India is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to this investigation. Accordingly, the ITC must determine whether imports of the subject merchandise from India materially injure, or threaten material injury to, a U.S. industry.

[9] *See* Volume I of the Petition, at I–4 through I–6, and Exhibit I–1.

[10] *See* India CVD Initiation Checklist, at Attachment II.

[11] *Id.*

[12] *Id.*

[13] *Id.*

Allegations and Evidence of Material Injury and Causation

Petitioners allege that imports of the subject merchandise are benefitting from countervailable subsidies and that such imports are causing, or threaten to cause, material injury to the U.S. industry producing the domestic like product. Petitioners allege that subject imports from India exceed the negligibility threshold provided under section 771(24)(B) of the Act, which states that in CVD petitions, imports of subject merchandise from developing countries must exceed the negligibility threshold of 4 percent.[14]

Petitioners contend that the industry's injured condition is illustrated by reduced market share; increased import penetration; underselling and price depression or suppression; lost sales and revenues; low capacity utilization; stagnant employment-related variables; and decline in financial performance.[15] We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation.[16]

Initiation of Countervailing Duty Investigation

Section 702(b)(1) of the Act requires the Department to initiate a CVD investigation whenever an interested party files a CVD petition on behalf of an industry that: (1) alleges the elements necessary for an imposition of a duty under section 701(a) of the Act; and (2) is accompanied by information reasonably available to the petitioner supporting the allegations.

In the Petition, Petitioners allege that producers and exporters of steel threaded rod from India benefited from countervailable subsidies bestowed by the GOI.

The Department has examined the Petition on steel threaded rod from India and finds that it complies with the requirements of section 702(b)(1) of the Act. Therefore, in accordance with section 702(b)(1) of the Act, we are initiating a CVD investigation to determine whether manufacturers, producers, or exporters of steel threaded

[14] *See* Volume I of the Petitions, at I–15 and I–16 and Exhibit I–7.

[15] *Id.,* at I–15 through I–29 and Exhibits I–5 through I–7 and I–10 through I–16; *see also* General Issues Supplement, at (Supp I)–4 through (Supp I)–7 and Attachments (Supp I)–6 through (Supp I)–10.

[16] *See* India CVD Initiation Checklist, at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Petitions Covering Steel Threaded Rod from India and Thailand.

rod from India receive countervailable subsidies.

Based on our review of the Petition, we find that there is sufficient information to initiate a CVD investigation of 11 alleged programs. For five other programs alleged to benefit Indian producers and exporters of steel threaded rod, we have determined that the requirements for initiation have not been met. For a full discussion of the basis for our decision to initiate or not initiate on each program, *see* India CVD Initiation Checklist.

A public version of the initiation checklist for this investigation is available at *http://ia.ita.doc.gov/ia-highlights-and-news.html*).

Respondent Selection

For this investigation, the Department expects to select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports of subject merchandise during the period of investigation under the following Harmonized Tariff Schedule of the United States numbers: 7318.15.5051, 7318.15.5056, 7318.15.5090 and 7318.15.2095.

We intend to release the CBP data under Administrative Protective Order (''APO'') to all parties with access to information protected by APO shortly after the announcement of this case initiation. Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on the Department's Web site at *http://ia.ita.doc.gov/apo.*

Interested parties may submit comments regarding the CBP data and respondent selection within seven calendar days of publication of this notice. Comments must be filed electronically using IA ACCESS. An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5 p.m. Eastern time by the date noted above. Documents excepted from the electronic submission requirements must be filed manually (*i.e.,* in paper form) with the Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, and stamped with the date and time of receipt by the deadline noted above.

We intend to make our decision regarding respondent selection within 20 days of publication of this notice.

Distribution of Copies of the Petition

In accordance with section 702(b)(4)(A)(i) of the Act and 19 CFR 351.202(f), copies of the public version of the Petition have been provided to the representatives of the GOI via IA ACCESS. Because of the particularly large number of producers/exporters identified in the Petition, the Department considers the service of the public version of the Petition to the foreign producers/exporters satisfied by the delivery of the public version of the Petition to the Government of India, consistent with 19 CFR 351.203(c)(2).

ITC Notification

We have notified the ITC of our initiation, as required by section 702(d) of the Act.

Preliminary Determinations by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the Petition was filed, whether there is a reasonable indication that imports of allegedly subsidized steel threaded rod from India are materially injuring, or threatening material injury to, a U.S. industry.[17] A negative ITC determination will result in the investigation being terminated; otherwise, the investigation will proceed according to statutory and regulatory time limits.

Submission of Factual Information

On April 10, 2013, the Department published *Definition of Factual Information and Time Limits for Submission of Factual Information: Final Rule,* 78 FR 21246 (April 10, 2013), which modified two regulations related to antidumping (''AD'') and CVD proceedings: the definition of factual information (19 CFR 351.102(b)(21)), and the time limits for the submission of factual information (19 CFR 351.301). The final rule identifies five categories of factual information in 19 CFR 351.102(b)(21), which are summarized as follows: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by the Department; and (v) evidence other than factual information described in (i)–(iv). The final rule requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. The final rule also modified 19 CFR 351.301 so that, rather than providing general time limits, there are specific time limits based on the type of factual information being submitted. These modifications are effective for all proceeding segments initiated on or after May 10, 2013, and thus are applicable to this investigation. Please review the final rule, available at *http://ia.ita.doc.gov/frn/2013/1304frn/2013-08227.txt,* prior to submitting factual information in these investigations.

Notification to Interested Parties

Interested parties must submit applications for disclosure under protective orders in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634. Parties wishing to participate in this investigation should ensure that they meet the requirements of these procedures (*e.g.,* the filing of letters of appearance as discussed at 19 CFR 351.103(d)).

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[18] Parties are hereby reminded that revised certification requirements are in effect for company/government officials, as well as their representatives, in all segments of any AD or CVD proceedings initiated on or after March 14, 2011.[19] The formats for the revised certifications are provided at the end of the *Interim Final Rule.* Foreign governments and their officials may continue to submit certifications in either the format that was in use prior to the effective date of the *Interim Final Rule,* or in the format provided in the *Interim Final Rule.*[20] The Department intends to reject factual information submissions if the submitting party does not comply with the revised certification requirements.

This notice is issued and published pursuant to section 777(i) of the Act.

[17] *See* section 703(a)(2) of the Act.

[18] *See* section 782(b) of the Act.

[19] *See Certification of Factual Information for Import Administration during Antidumping and Countervailing Duty Proceedings: Interim Final Rule,* 76 FR 7491 (February 10, 2011) (*Interim Final Rule*), amending 19 CFR 351.303(g)(1) and (2).

[20] *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Supplemental Interim Final Rule,* 76 FR 54697 (September 2, 2011).

Dated: July 17, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

Attachment

Scope of the Investigation

The merchandise covered by this investigation is steel threaded rod. Steel threaded rod is certain threaded rod, bar, or studs, of carbon quality steel, having a solid, circular cross section, of any diameter, in any straight length, that have been forged, turned, cold-drawn, cold-rolled, machine straightened, or otherwise cold-finished, and into which threaded grooves have been applied. In addition, the steel threaded rod, bar, or studs subject to this investigation are nonheaded and threaded along greater than 25 percent of their total length. A variety of finishes or coatings, such as plain oil finish as a temporary rust protectant, zinc coating (*i.e.,* galvanized, whether by electroplating or hot-dipping), paint, and other similar finishes and coatings, may be applied to the merchandise.

Included in the scope of this investigation are steel threaded rod, bar, or studs, in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

- 1.80 percent of manganese, or
- 1.50 percent of silicon, or
- 1.00 percent of copper, or
- 0.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or
- 1.25 percent of nickel, or
- 0.30 percent of tungsten, or
- 0.012 percent of boron, or
- 0.10 percent of molybdenum, or
- 0.10 percent of niobium, or
- 0.41 percent of titanium, or
- 0.15 percent of vanadium, or
- 0.15 percent of zirconium.

Steel threaded rod is currently classifiable under subheadings 7318.15.5051, 7318.15.5056, 7318.15.5090 and 7318.15.2095 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Excluded from the scope of this investigation are: (a) threaded rod, bar, or studs which are threaded only on one or both ends and the threading covers 25 percent or less of the total length; and (b) threaded rod, bar, or studs made to American Society for Testing and Materials (''ASTM'') A193 Grade B7, ASTM A193 Grade B7M, ASTM A193 Grade B16, and ASTM A320 Grade L7.

[FR Doc. 2013–17795 Filed 7–23–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Civil Nuclear Trade Advisory Committee (CINTAC) Meeting

AGENCY: ITA, DOC.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda for a meeting of the CINTAC.

DATES: The meeting is scheduled for Wednesday, August 28, 2013, 9:00 a.m. to 4:00 p.m. Eastern Daylight Time (EDT).

ADDRESSES: The meeting will be held in Room 1412, U.S. Department of Commerce, Herbert Clark Hoover Building, 1401 Constitution Ave. NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Mr. David Kincaid, Office of Energy & Environmental Industries, ITA, Room 4053, 1401 Constitution Ave. NW., Washington, DC 20230. (Phone: 202–482–1706; Fax: 202–482–5665; email: *david.kincaid@trade.gov*).

SUPPLEMENTARY INFORMATION:

Background: The CINTAC was established under the discretionary authority of the Secretary of Commerce and in accordance with the Federal Advisory Committee Act (5 U.S.C. App.), in response to an identified need for consensus advice from U.S. industry to the U.S. Government regarding the development and administration of programs to expand United States exports of civil nuclear goods and services in accordance with applicable U.S. laws and regulations, including advice on how U.S. civil nuclear goods and services export policies, programs, and activities will affect the U.S. civil nuclear industry's competitiveness and ability to participate in the international market.

Topics to be considered: The agenda for the August 28, 2013 CINTAC meeting is as follows:

9:00 a.m.–3:00 p.m.

1. Establish subcommittees
2. Announce chair and vice-chair positions
3. Organize subcommittees

3:00 p.m.–4:00 p.m.

4. Public Comment Period

The meeting will be disabled-accessible. Public seating is limited and available on a first-come, first-served basis. Members of the public wishing to attend the meeting must notify Mr. David Kincaid at the contact information below by 5:00 p.m. EDT on Friday, August 23, 2013 in order to pre-register for clearance into the building. Please specify any requests for reasonable accommodation at least five business days in advance of the meeting. Last minute requests will be accepted, but may be impossible to fill.

A limited amount of time will be available for pertinent brief oral comments from members of the public attending the meeting. To accommodate as many speakers as possible, the time for public comments will be limited to two (2) minutes per person, with a total public comment period of 30 minutes. Individuals wishing to reserve speaking time during the meeting must contact Mr. Kincaid and submit a brief statement of the general nature of the comments and the name and address of the proposed participant by 5:00 p.m. EDT on Friday, August 23, 2013. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, ITA may conduct a lottery to determine the speakers. Speakers are requested to bring at least 20 copies of their oral comments for distribution to the participants and public at the meeting.

Any member of the public may submit pertinent written comments concerning the CINTAC's affairs at any time before and after the meeting. Comments may be submitted to the Civil Nuclear Trade Advisory Committee, Office of Energy & Environmental Industries, Room 4053, 1401 Constitution Ave, NW., Washington, DC 20230. For consideration during the meeting, and to ensure transmission to the Committee prior to the meeting, comments must be received no later than 5:00 p.m. EDT on Friday, August 23, 2013. Comments received after that date will be distributed to the members but may not be considered at the meeting.

Copies of CINTAC meeting minutes will be available within 90 days of the meeting.

Edward A. O'Malley,

Director, Office of Energy and Environmental Industries.

[FR Doc. 2013–17681 Filed 7–23–13; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Licensing of Private Remote-Sensing Space Systems

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 September 23, 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 Tahara Dawkins, *tahara.dawkins@noaa.gov* or (301) 713–3385.

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a current information collection.

NOAA has established requirements for the licensing of private operators of remote-sensing space systems. The information in applications and subsequent reports is needed to ensure compliance with the Land Remote-Sensing Policy Act of 1992 and with the national security and international obligations of the United States. The requirements are contained in 15 CFR Part 960.

II. Method of Collection

Information is submitted via email.

III. Data

OMB Control Number: 0648–0174.

Form Number: None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 18.

Estimated Time per Response: 40 hours for the submission of a license application; 10 hours for the submission of a data protection plan; 5 hours for the submission of a plan describing how the licensee will comply with data collection restrictions; 3 hours for the submission of an operations plan for restricting collection or dissemination of imagery of Israeli territory; 3 hours for submission of a data flow diagram; 2 hours for the submission of satellite sub-systems drawings; 3 hours for the submission of a final imaging system specifications document; 2 hours for the submission of a public summary for a licensed system; 2 hours for the submission of a preliminary design review; 2 hours for the submission of a critical design review; 1 hour for notification of a binding launch services contract; 1 hour for notification of completion of pre-ship review; 10 hours for the submission of a license amendment; 2 hours for the submission of a foreign agreement notification; 2 hours for the submission of spacecraft operational information submitted when a spacecraft becomes operational; 2 hours for notification of deviation in orbit or spacecraft disposition; 2 hours for notification of any operational deviation; 2 hours for notification of planned purges of information to the National Satellite Land Remote Sensing Data Archive; 3 hours for the submission of an operational quarterly report; 8 hours for an annual compliance audit; 10 hours for an annual operational audit; and 2 hours for notification of the demise of a system or a decision to discontinue system operations.

Estimated Total Annual Burden Hours: 552.

Estimated Total Annual Cost to Public: $1,000 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: July 18, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–17736 Filed 7–23–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–BC90

Marine Mammals; Notice of Availability of a Draft Environmental Impact Statement To Amend the Atlantic Large Whale Take Reduction Plan

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

ACTION: Notice of Availability of a Draft Environmental Impact Statement; notice of public hearing meetings; request for comments.

SUMMARY: NMFS proposes to amend the regulations implementing the Atlantic Large Whale Take Reduction Plan (Plan). The proposed rule revises the management measures for reducing the incidental mortality and serious injury to the North Atlantic right whale (*Eubalaena glacialis*), humpback whale (*Megaptera novaeangliae*), and fin whale (*Balaenoptera physalus*) in commercial trap/pot and gillnet fisheries to meet the goals of the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA). A Draft Environmental Impact Statement (DEIS) was prepared in accordance with the National Environmental Policy Act (NEPA), to analyze impacts to the environment of the management alternatives under consideration. NMFS will hold 16 public hearings along the East coast in August and September for the purpose of answering questions and receiving public testimony on the DEIS.

DATES: The public hearings will be held in August and September. For specific dates, times, and locations see **SUPPLEMENTARY INFORMATION** section. The public comment period is from July 12, 2013, to September 13, 2013.

ADDRESSES: You may submit comments on this document, identified by 130201095–3095–01, by any of the following methods:

• *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0095* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.

• *Mail:* Submit written comments to Mary Colligan, Assistant Regional Administrator for Protected Resources, NMFS Northeast Region, 55 Great Republic Dr., Gloucester, MA 01930, Attn: Large Whale Proposed Rule.

• *Fax:* 978–281–9394 Attn: Large Whale Proposed Rule

• *In-Person:* Attend a public hearing. See **SUPPLEMENTARY INFORMATION** section for locations, dates, and times.

FOR FURTHER INFORMATION CONTACT: Kate Swails, NMFS, Northeast Region, 978–282–8481, *Kate.Swails@noaa.gov;* Kristy Long, NMFS Office of Protected Resources, 301–427–8440, *Kristy.Long@noaa.gov;* or Barb Zoodsma, NMFS Southeast Region, 904–321–2806, *Barb.Zoodsma@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

Large whale entanglements resulting in serious injuries and mortalities are still occurring; therefore, NMFS believes modifications to the Plan are needed to meet the goals of the Marine Mammal Protection Act (MMPA). Under the MMPA, NMFS is required to reduce the incidental mortality and serious injury to three strategic large whale stocks—the Western Stock of the North Atlantic right whales (*Eubalaena glacialis*), the Gulf of Maine stock of humpback whales (*Megaptera novaeangliea*), and the Western North Atlantic stock of fin whales (*Balaenoptera physalus)*—incidentally taken in commercial fisheries to below the Potential Biological Removal (PBR) level for each stock.

Atlantic Large Whale Take Reduction Team (Team)

At its 2009 meeting, the Team agreed on a schedule to develop a management approach to reduce the risk of serious injury and mortality due to vertical line. As a result of this schedule NMFS committed to publishing a final rule to address vertical line entanglement by 2014. The approach for the vertical line rule will focus on reducing the risk of vertical line entanglements in high impact areas versus a wide-broad scale management scheme. Using fishing gear survey data and whale sightings per unit effort (SPUE), a model was developed to determine the co-occurrence of fishing gear density and whale density.

The Team's Northeast Subgroup met in November 2010 and the Mid-Atlantic/Southeast Subgroup met in April 2011 to review the model and consider its implications for an overall management strategy to address vertical line entanglements.

The Team agreed NMFS should use the model to consider and develop possible options to address fishery interactions with large whales by reducing the potential for entanglements, minimize adverse effects if entanglements occur, and mitigate the effects of any unavoidable entanglements.

To solicit additional stakeholder involvement, on June 14, 2011, NMFS published a Notice of Intent in the **Federal Register** (76 FR 34654) to announce the agency's intent to prepare an Environmental Impact Statement that would analyze the impacts of alternatives for amending the Plan. In July and August 2011, NMFS held 15 scoping meetings to solicit feedback on the vertical line risk reduction strategy. The information provided at the scoping meetings was also reviewed at a full Team meeting in January 2012. Team members further refined their vertical line risk reduction proposals and the team met via teleconference in February 2012 to review the final proposals submitted. The Team reviewed five proposals: three from state agencies, one from the scientist/academic community, and one from the conservation community. Results of the proposals were presented via teleconference in April 2012. Each vertical line risk reduction proposal was analyzed to assess its impact on both the number of vertical lines and co-occurrence scores relative to the baseline in the Northeast and coastwide.

NMFS designed the proposed alternatives in the DEIS based on comments received during public scoping and using many of the measures submitted by the team in their stakeholder proposals. The alternatives include measures requiring increased traps per trawl, the use of weaker weak links and/or vertical lines of lower breaking strength, and potential time-area closures.

Several of the background documents for the Plan and the take reduction planning process can be downloaded from the Plan Web site at *http://www.nero.noaa.gov/whaletrp/.* Copies of the DEIS/Regulatory Impact Review for this action can also be obtained online. NMFS has scheduled public hearings on the DEIS. The purpose of the hearings is to provide the public the opportunity to ask questions and provide comments on the upcoming action.

Hearing Dates, Times, and Locations

The dates, times, and locations of the meetings are scheduled as follows:

1. Monday, August 5, 2013—Machias, ME 6–9 p.m.

University of Maine at Machias (Science Building), 116 O'Brien Avenue, Machias, ME 04654

2. Tuesday, August 6, 2013—Ellsworth, ME 6–9 p.m.

Ellsworth Public Library, 20 State Street, Ellsworth, Maine 04605

3. Wednesday, August 7, 2013—Rockland, ME 6–9 p.m.

Oceanside East High School (Auditorium), 400 Broadway, Rockland, ME 04841

4. Thursday, August 8, 2013—Portland, ME 6–9 p.m.

Portland City Hall (State of Maine Room), 389 Congress St., Portland, ME 04101

5. Tuesday, August 13, 2013—Chatham, MA 6–9 p.m.

Chatham Community Center (Large Meeting Room), 702 Main St., Chatham, MA 02633

6. Wednesday August 14, 2013—Plymouth, MA 6–9 p.m.

Plymouth Public Library, 132 South St., Plymouth, MA 02360

7. Thursday, August 15, 2013—Narraganset, RI 6–9 p.m.

URI Campus, Coastal Institute Building (large conference room), 215 South Ferry Road, Narragansett, RI 02882

8. Monday August 19, 2013—Gloucester, MA 6–9 p.m.

NOAA Northeast Regional Office (Hearing Room A&B), 55 Great Republic Dr., Gloucester, MA 01930

9. Tuesday, August 20, 2013—Portsmouth, NH 5–8 p.m.

Urban Forestry Center 27, Elwyn Road, Portsmouth, NH 03801

10. Monday, August 26, 2013—Wilmington, NC 5:30–7:30 p.m.

New Hanover County Public Library-Main Library (Masonboro Rm), 201 Chestnut St., Wilmington, NC 28401

11. Tuesday, August 27, 2013—Virginia Beach, VA 6–9 p.m.

Meyera E. Obendorf Central Library (Auditorium), 4100 Virginia Beach Blvd., Virginia Beach, VA 23452

12. Wednesday, August 28, 2013—Manahawkin, NJ 6–9 p.m.

Stafford Township (Court room), 260 E. Bay Ave., Manahawkin, NJ 08050

13. Monday September 9, 2013—Ormond Beach, FL 4:30–6:30 p.m.

Ormond Beach Public Library, 30 S. Beach St., Ormond Beach, FL 32174

14. Tuesday September 10, 2013—Jacksonville, FL 5–7 p.m.

Jacksonville Port Authority (Board Room), 2831 Talleyrand Avenue, Jacksonville, FL 32206

15. Wednesday September 11, 2013—Brunswick, GA 5–7 p.m.

Georgia Department of Natural Resources (Classroom), 1 Conservation Way, Brunswick, GA 31520

16. Thursday September 12, 2013—Charleston, SC 5–7 p.m.

South Carolina Department of Natural Resources, Marine Resources Research Institute (Auditorium), 217 Ft. Johnson Rd., Charleston, SC 29412

Special Accommodations

These meetings are physically accessible to people with disabilities. Request for sign language interpretation or other auxiliary aids should be directed to Kate Swails (978) 282–8481 at least 7 working days prior to the hearing date.

Authority: 16 U.S.C. 1361 *et seq.*

Dated: July 18, 2013.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–17737 Filed 7–23–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC774

Caribbean Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Caribbean Fishery Management Council (Council) and its Administrative Committee will hold meetings.

DATES: The meetings will be held on August 13–14, 2013. The Council will convene on Tuesday, August 13, 2013 from 9 a.m. to 5 p.m., and the Administrative Committee will meet from 5:15 p.m. to 6 p.m. The Council will reconvene on Wednesday, August 14, 2013, from 8:30 a.m. to 5 p.m.

ADDRESSES: The meetings will be held at the Hilton Ponce Golf and Casino Resort, 1150 Caribe Avenue, Ponce, Puerto Rico 00716–2015.

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 147th regular Council Meeting to discuss the items contained in the following agenda:

August 13, 2013, 9 a.m.–5 p.m.

- Call to Order
- Election of Officials
- Adoption of Agenda
- Consideration of 146th Council Meeting Verbatim Transcriptions
- Executive Director's Report
- Scoping Meetings Report on the Development of Island-Based Fishery Management Plans (FMPs) in the U.S. Caribbean: Transition from Species-Based FMPs to Island-Based FMPs
- Adhoc Committee Report (July 24, 2013)
- Trap Reduction Project Report
- Results of Red Hind/Grouper Analysis—David Olsen
- Update on the CFMC/STFA Lobster Study—David Olsen

Public Comment Period (5-minutes presentations)

August 13, 2013, 5:15 p.m.–6 p.m.

- Administrative Committee Meeting
  —Budget Update FY 2013/14
  —SSC/AP Memberships
  —Other Business

August 14, 2013, 8:30 a.m.–5 p.m.

- Fishery Workshops around Puerto Rico—Carlos Velazquez and Helena Antoun
- Don't Stop Talking Fish Video for the USVI—Lia Ortiz, Franklin Fullock and Angel Bolges
- Artificial Reef Project and Two Prototypes of Traps: Octopus and Spiny Lobster—Yabucoa Fishers Association—Héctor Padró
- The Productive Aspect of Deep-Water Snappers—Eugenio Pi eiro
- Spawning Aggregation Project Update—Richard Appeldoorn/Michel Sharer
- Tales from La Cordillera: Promoting Sustainable Fishing through Environmental Interpretation—Alejandro Torres
- Outreach and Education Meeting Report—Alida Ortiz
- Enforcement Issues:
  —Puerto Rico-DNER
  —U.S. Virgin Islands-DPNR
  —NOAA/NMFS
  —U.S. Coast Guard
- Administrative Committee Recommendations
- Meetings Attended by Council Members and Staff

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 meetings are 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 these meetings. 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

These meetings are 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: July 18, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–17759 Filed 7–23–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC777

Mid-Atlantic Fishery Management Council (MAFMC); Public Meetings

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

ACTION: Notice of public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council) and its Research Set-Aside Committee (RSA), and its Ecosystems and Ocean Planning Committee will hold public meetings.

DATES: The meetings will be held Tuesday, August 13, 2013 through Thursday, August 15, 2013. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meeting will be held at the Double Tree Hilton Wilmington, 4727 Concord Pike, Wilmington, DE telephone: (302) 478–6000.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State St., Suite 201, Dover, DE 19901; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D. Executive Director, Mid-Atlantic Fishery Management Council; telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION:

Tuesday, August 13, 2013

1 p.m. until 3 p.m.—The RSA Committee will meet.

3 p.m. until 5 p.m.—The Ecosystems and Ocean Planning Committee with Advisors will meet.

5 p.m. until 6 p.m.—The Listening Session will be held.

Wednesday, August 14, 2013

9 a.m.—The Council will convene.

9 a.m. until 9:15 a.m.—Swearing in of new and reappointed Council members and the election of Council Officers will be held.

9:15 a.m. until 10:30 a.m.—A discussion of the Strategic Plan will be held.

10:30 a.m. until 12 p.m.—The Deep Sea Coral Amendment will be discussed.

1:30 p.m. until 2:30 p.m.—The Omnibus Baseline Amendment will be discussed.

2:30 p.m. until 3 p.m.—Surfclams and Ocean Quahogs will be discussed.

3 p.m. until 4 p.m.—Butterfish research will be discussed from

4 p.m. until 5—The South Atlantic Fishery Management Council (SAFMC) will hold a public hearing.

Thursday, August 15, 2013

9 a.m. until 1 p.m.—The Council will hold its regular Business Session to approve the June 2013 minutes, receive Organizational Reports, the New England and South Atlantic Liaison Reports, the Executive Director's Report, the Science Report, Committee Reports, and conduct any continuing and/or new business.

Agenda items by day for the Council's Committees and the Council itself are:

Tuesday, August 13, 2013

The RSA Committee will develop research recommendations for 2015 and discuss Council policy for future RSA research prioritization and Request for Proposal development. The Ecosystems and Ocean Planning Committee will meet with Advisors to review and approve the Deep Sea Coral alternatives for Public Hearing. The Listening Session will focus on Mid-Atlantic ocean wind power and fisheries.

Wednesday, August 14, 2013

The Council will swear in new and reappointed Council Members and elect Council Officers. The Council will review public comments and approve the Strategic Plan and discuss development of an implementation plan. The Council will approve alternatives for public hearings for the Deep Sea Coral Amendment. The Council will receive an Omnibus Baseline Amendment update on National Marine Fisheries Service actions on NE vessel replacement restrictions. The Council will discuss possible approaches to update Biological Reference Points and Optimum Yield range for Surfclams and Ocean Quahogs. The Council will hear the results of butterfish and longfin squid bio-economic research from recent Duke and University of Delaware graduate students. The SAFMC will hold a public hearing for the Generic Dealer Amendment, Amendment 5 to Dolphin/Wahoo, Amendment 19 and 20 to the Joint Coastal Migratory Pelagics (CMP), and the Framework to CMP.

Thursday, August 15, 2013

The Council will hold its regular Business Session to approve the June 2013 minutes, receive Organizational Reports to include a presentation from the US Coast Guard on Enforceability Precepts for Northeast Regional Fishery Management Councils, the New England and South Atlantic Liaison Reports, the Executive Director's Report, Science Report, Committee Reports, receive and approve SSC nominations, and conduct any continuing and/or new business.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. 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 Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: July 19, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–17774 Filed 7–23–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC622

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to a Pier Replacement Project

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that we have issued an incidental harassment authorization (IHA) to the U.S. Navy (Navy) to incidentally harass, by Level B harassment only, four species of marine mammals during construction activities associated with a pier replacement project in San Diego Bay, California.

DATES: This authorization is effective from September 1, 2013, through August 31, 2014.

ADDRESSES: A copy of the IHA and related documents may be obtained by visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* or by writing to Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East West Highway, Silver Spring, MD 20910. A memorandum describing our adoption of the Navy's Environmental Assessment (2013) and our associated Finding of No Significant Impact, prepared pursuant to the National Environmental Policy Act, are also available at the same site. Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Ben Laws, 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. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].''

Summary of Request

We received an application on September 24, 2012, from the Navy for the taking of marine mammals incidental to pile driving and removal in association with a pier replacement project in San Diego Bay at Naval Base Point Loma in San Diego, CA (NBPL). The Navy submitted a revised version of the application on November 15, 2013, which we deemed adequate and complete, and submitted additional revisions on December 20, 2012, and April 22, 2013. The pier replacement project is a multi-year project; this IHA would cover only the first year of the project, from September 1, 2013, through August 31, 2014. Four species of marine mammals are expected to occur in the vicinity of the project during all or a portion of the project duration: California sea lion (*Zalophus californianus californianus*), harbor seal (*Phoca vitulina richardii*), bottlenose dolphin (*Tursiops truncatus truncatus*), and gray whale (*Eschrichtius robustus*). California sea lions are present year-round and are common in the project area, while bottlenose dolphins may be present year-round but sightings are highly variable in Navy marine mammal surveys of northern San Diego Bay. Harbor seals have limited occurrence in the project area. Gray whales may be observed in San Diego Bay sporadically during migration periods.

NBPL provides berthing and support services for Navy submarines and other fleet assets. The existing fuel pier serves as a fuel depot for loading and unloading tankers and Navy underway replenishment vessels that refuel ships at sea (''oilers''), as well as transferring fuel to local replenishment vessels and other small craft operating in San Diego Bay, and is the only active Navy fueling facility in southern California. Portions of the pier are over one hundred years old, while the newer segment was constructed in 1942. The pier as a whole is significantly past its design service life and does not meet current construction standards.

Demolition and construction will occur in two phases to maintain the fueling capabilities of the existing fuel pier while the new pier is being constructed. The total duration of demolition/construction is estimated to be approximately four years (2013–17). During the first year of construction (the specified activity considered under this IHA), approximately 120 piles (including 18-in concrete and 36 to 48-in steel) will be installed and 109 piles will be removed (via multiple methods). All steel piles will be driven with a vibratory hammer for their initial embedment depths and finished with an impact hammer for proofing, as necessary.

For pile driving activities, the Navy used NMFS-promulgated thresholds for assessing project impacts, outlined later in this document. The Navy used a site-specific model for transmission loss and empirically-measured source levels from other 36–72 in diameter pile driving events to estimate potential marine mammal exposures. Predicted exposures are outlined later in this document.

Description of the Specified Activity

NBPL is located on the peninsula of Point Loma near the mouth and along the northern edge of San Diego Bay (see Figures 1–1 and 1–2 in the Navy's application). The specified activities with the potential to cause harassment of marine mammals within the waterways adjacent to NBPL, under the MMPA, are vibratory and impact pile driving and removal of piles via vibratory driver or pneumatic chipper associated with the pier replacement project and associated projects. The entire project is scheduled to occur from 2013–17; the specified activities for which incidental take is authorized by this IHA will occur for one year from September 1, 2013. Under the terms of a memorandum of understanding between the Navy and the U.S. Fish and Wildlife Service, all noise- and turbidity-producing in-water activities in designated least tern foraging habitat are to be avoided during the period when least terns are present and engaged in nesting and foraging. Therefore, all in-water construction activities will occur during a window from approximately September 15 through April 1. Additional details regarding the specified geographic area and construction plans for the project were described in our **Federal Register** notice of proposed authorization (78 FR 30873; May 23, 2013; hereafter, the FR notice); please see that document or the Navy's application for more information.

The fuel pier replacement will consist of concurrent demolition of the old pier and construction of the new pier, such that fueling capabilities are maintained, as well as (1) temporary relocation of the Navy Marine Mammal Program (MMP); (2) temporary relocation of the Everingham Brothers San Diego Bay Bait Barge facility; and (3) dredging and sediment disposal. The bait barge facility is being moved during the project because it is a primary attractant of California sea lions to the project area and the relocation may be expected to reduce the number of sea lions exposed to noise levels constituting harassment under the MMPA. Dredging and sediment disposal are not considered to have significant impacts under the MMPA and are not considered as part of the specified activities described herein and in the FR notice. Pier demolition and construction and relocation of the MMP will require impact and vibratory pile driving. See Table 1–1 in the Navy's application for a complete construction phase summary.

For the entire project, approximately 1,500 piles and caissons of various materials will be removed. There are multiple methods for pile removal, including dry pulling, cutting at the mudline, jetting, and vibratory removal. The majority of these methods do not produce significant levels of underwater sound; however, a vibratory hammer or pneumatic chipper may be required for certain piles. For the replacement pier structure, approximately 554 total piles will be installed, including steel and concrete piles of various sizes. For steel piles, vibratory driving is the preferred method of installation and will be used to drive the pile to refusal. The impact hammer may then be used for proofing or until the pile meets structural requirements. The concrete piles will first be jetted, a process wherein pressurized air or water jets are applied at the tip of the pile to loosen the substrate and allow the pile to sink vertically, before being driven the last few feet with the impact hammer. The fiberglass piles do not need to be embedded very deeply into the subsurface so will be impact-driven for the entire length. In all cases, impact driving will be minimized.

Initial pile driving will be conducted as part of an Indicator Pile Program (IPP), designed to validate the length of pile required and the method of installation (vibratory and impact). Approximately twelve steel pipe piles (36- and 48-in diameter, exact mix to be determined later) will be driven in the new pier alignment to verify the driving conditions and establish the final driving lengths prior to fabrication of the final production piles that will be used to construct the new pier. In addition, the IPP will validate the acoustics modeling used by the Navy to estimate incidental take levels. Table 1–4 in the Navy's application summarizes the total piles that would be installed over the life of the project.

The specified activity for the one-year period of this IHA includes pile driving associated with relocation of the MMP, pile driving associated with the IPP and construction of a temporary mooring dolphin, and beginning of construction of the new pier structure. In addition, pile removal associated with demolition of the old structure will begin. These activities are detailed in Table 1. The majority of pile removal will likely not require the use of vibratory extraction and/or pneumatic chipping, and these methods are included here as contingency in the event other methods of extraction are not successful.

TABLE 1—SPECIFIED ACTIVITY SUMMARY (2013–14)

Activity	Timing (days)	Pile type	Number piles
MMP relocation (at NMAWC)	Sep-Oct 2013 (16)	18-in square concrete	50
Indicator Pile Program	Mar 2014 (17)	36- and 48-in steel pipe	12
Temporary mooring dolphin	Mar 2014 (5)	36-in steel pipe	16
Abutment pile driving	Mar–Apr 2014 (13)	48-in steel pipe	24
Structural pile driving	Mar–Apr 2014 (15)	36- and 48-in steel pipe	26
Total installed			128
Pile removal[1]	Mar–Sep 2014	16- and 24-in square concrete	18
Pile removal[1]	Mar–Sep 2014	12-in timber	91

[1] Pile removal schedule is notional and is dependent on contractor workload and timing of in-water work shutdown in spring 2014. Removals using no-impact methods (e.g., dry pull) may continue outside the in-water work window or would resume under the period of subsequent IHAs (i.e., September 2014).

The analysis contained herein is based upon the specified work schedule. During the first year of work, approximately 66 non-overlapping days of pile driving are expected to occur in the episodes described in Table 1. Approximately 84 days of demolition work are expected, beginning in March 2014. The majority of these 84 days will involve above-water work or other no-impact methods and will not impact marine mammals; the Navy assumes that approximately one quarter of the days (21 days) might involve methods that could cause disturbance to marine mammals.

Description of Sound Sources and Distances to Thresholds

An in-depth description of sound sources in general was provided in the FR notice (78 FR 30873; May 23, 2013). Significant sound-producing in-water construction activities associated with the project include impact and vibratory pile driving and vibratory pile removal.

NMFS uses generic sound exposure thresholds to determine when an activity that produces sound might result in impacts to a marine mammal such that a take by harassment might occur. To date, no studies have been conducted that examine impacts to marine mammals from pile driving sounds from which empirical sound thresholds have been established. Current NMFS practice (in relation to the MMPA) regarding exposure of marine mammals to sound is that cetaceans and pinnipeds exposed to sound levels of 180 and 190 dB root mean square (rms; note that all underwater sound levels in this document are referenced to a pressure of 1 μPa) or above, respectively, are considered to have been taken by Level A (i.e., injurious) harassment, while behavioral harassment (Level B) is considered to have occurred when marine mammals are exposed to sounds at or above 120 dB rms for continuous sound (such as will be produced by vibratory pile driving) and 160 dB rms for pulsed sound (produced by impact pile driving), but below injurious thresholds. For airborne sound, pinniped disturbance from haul-outs has been documented at 100 dB (unweighted) for pinnipeds in general, and at 90 dB (unweighted) for harbor seals (note that all airborne sound levels in this document are referenced to a pressure of 20 μPa). NMFS uses these levels as guidelines to estimate when harassment may occur. NMFS is currently revising these acoustic guidelines. For more information on that process, please visit *http://www.nmfs.noaa.gov/pr/acoustics/guidelines.htm.*

Distance to Sound Thresholds

Pile driving generates underwater noise that can potentially result in disturbance to marine mammals in the project area. Please see the FR notice (78 FR 30873; May 23, 2013) for a detailed description of the calculations and information used to estimate distances to relevant threshold levels. In general, the sound pressure level (SPL) at some distance away from the source (e.g., driven pile) is governed by a measured source level, minus the transmission loss of the energy as it dissipates with distance. Transmission loss—the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source—was modeled specifically for the project site on the basis of historical temperature-salinity data and location-dependent bathymetry. In the model, TL is the same for different sound source levels and is applied to each of the different activities to determine the point at which the applicable thresholds are reached as a function of distance from the source. The model's predictions result in a slightly lower average rate of TL than practical spreading, and hence are conservative. Because the model is specific to the project area around the fuel pier site, practical spreading loss was assumed in modeling sound propagation for pile driving at the relocation site for the Navy Marine Mammal Program facility. The practical spreading model follows a geometric propagation loss based on the distance from the pile, resulting in a 4.5 dB reduction in level for each doubling of distance from the source.

The intensity of pile driving sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment in which the activity takes place. Literature regarding SPLs recorded from pile driving projects is available for consideration. In order to determine reasonable SPLs and their associated effects on marine mammals that are likely to result from pile driving at NBPL, studies with similar properties to the proposed action were evaluated. Piles to be installed include 36- and 48-in steel pipe piles, 24- and 18-in concrete piles, and 16-in fiberglass-concrete piles. In addition, a vibratory pile driver could be used in the extraction of 16-in steel, 14-, 16- and 24-in concrete, 13-in plastic, and 12-in timber piles. Sound levels associated with vibratory pile removal are assumed to be the same as those during vibratory installation (Reyff, 2007)—which is likely a conservative assumption—and have been taken into consideration in the modeling analysis. Overall, studies which met the following parameters were considered: (1) Pile size and materials: Steel pipe piles (30–72 in diameter); (2) Hammer machinery: Vibratory and impact hammer; and (3) Physical environment: shallow depth (less than 100 ft [30 m]).

Representative data for pile driving SPLs recorded from similar construction activities in recent years, as well as additional assumptions made in determining appropriate proxy values, were presented in the FR notice (78 FR 30873; May 23, 2013). Underwater sound levels from pile driving for this project are therefore assumed to be as follows:

- For 36- and 48-in steel pipes, 195 dB re 1 μPa (rms) at 10 m when driven by impact hammer, 180 dB re 1 μPa (rms) at 10 m when driven by vibratory hammer;
- For 24-in concrete piles driven by impact hammer, 176 dB re 1 μPa (rms) at 10 m; and
- For 16- and 18-in concrete piles driven by impact hammer, 173 dB re 1 μPa (rms) at 10 m.
- For vibratory removal of steel piles, 172 dB re 1 μPa (rms) at 10 m; for vibratory removal/pneumatic chipping of non-steel piles, 160 dB re 1 μPa (rms) at 10 m.

Based on these values and the results of site-specific transmission loss modeling, distances to relevant thresholds and associated areas of ensonification are presented in Table 2. Predicted distances to thresholds for different sources are shown in Figures 6–1 through 6–7 of the Navy's application. The areas of ensonification reflect the conventional assumption that topographical features such as shorelines act as a barrier to underwater sound. Although it is known that there can be leakage or diffraction around such barriers, it is generally accepted practice to model underwater sound propagation from pile driving as continuing in a straight line past a shoreline projection such as Ballast Point. In contrast, although Zuniga Jetty would likely prevent sound propagation east of the jetty, this effect was not considered. Hence the projection of sound through the mouth of the bay into the open ocean would be truncated along the jetty and narrower in reality than shown. The limits of ensonification due to the project are assumed to be essentially the same for different pile sizes subject to vibratory installation or removal.

TABLE 2—DISTANCES TO RELEVANT SOUND THRESHOLDS AND AREAS OF ENSONIFICATION

Description	Source level (dB at 10 m)	Distance to threshold (m) and associated area of ensonification (km²)			
		190 dB	180 dB	160 dB	120 dB
Steel piles, impact	195	36/0.0034	452/0.1477	5,484/8.5069	n/a
Steel piles, vibratory	180	n/a	14/0.0004	n/a	6,470/11.4895
24-in concrete piles	176	n/a	n/a	505/0.1914	n/a
16-in concrete-fiberglass piles	173	n/a	n/a	259/0.0834	n/a
18-in concrete piles[1] (NMAWC)	173	n/a	n/a	84/0.0620	n/a
Vibratory extraction, steel	172	n/a	n/a	n/a	6,467/11.4895
Vibratory extraction/pneumatic chipping, non-steel	160	n/a	n/a	n/a	6,467/11.4890

[1] Practical spreading loss was assumed for pile driving at marine mammal relocation site because site-specific TL model used for sources at fuel pier is not applicable.

Pile driving can generate airborne sound that could potentially result in disturbance to marine mammals (specifically, pinnipeds) which are hauled out or at the water's surface. As a result, the Navy analyzed the potential for pinnipeds hauled out or swimming at the surface near NBPL to be exposed to airborne SPLs that could result in Level B behavioral harassment. A spherical spreading loss model (i.e., 6 dB reduction in sound level for each doubling of distance from the source), in which there is a perfectly unobstructed (free-field) environment not limited by depth or water surface, is appropriate for use with airborne sound and was used to estimate the distance to the airborne thresholds.

As was discussed for underwater sound from pile driving, the intensity of pile driving sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment in which the activity takes place. In order to determine reasonable airborne SPLs and their associated effects on marine mammals that are likely to result from pile driving at NBPL, studies with similar properties to the Navy's project, as described previously, were evaluated.

Based on in-situ recordings from similar construction activities, the Navy previously considered the maximum airborne sound levels that would result from impact and vibratory pile driving as 118 dB and 96 dB (at 15 m), respectively (Blackwell *et al.,* 2004; Laughlin, 2010). The Navy has calculated the radial distances to the 90 and 100 dB airborne thresholds as 358 m and 113 m, respectively, for impact pile driving and 28 m and 9 m, respectively, for vibratory pile driving. The nearest known haul-out location for harbor seals is approximately 250 m distant from the notional pile driving location and hence would be subject to sound levels that may result in behavioral disturbance, if animals are present. For sea lions, all airborne distances are less than those calculated for underwater sound thresholds, therefore, protective measures would be in place out to the distances calculated for the underwater thresholds, and the distances for the airborne thresholds would be covered fully by mitigation and monitoring measures in place for underwater sound thresholds. No sea lion haul-outs or rookeries are located within the airborne harassment radii. However, we assume that any harbor seals present at the haul-out would likely flush into the water if harassed, and would therefore be subject to underwater sound. Similarly, pinnipeds in water that are within the area of ensonification for airborne sound could be incidentally taken by either underwater or airborne sound or both. Therefore, we consider any incidences of harassment from airborne sound to be accounted for in the take estimates for underwater sound.

Comments and Responses

We published a notice of receipt of the Navy's application and proposed IHA in the **Federal Register** on May 23, 2013 (78 FR 30873). NMFS received comments from the Marine Mammal Commission (Commission), as well as a letter from the National Park Service. The Commission's comments and our responses are provided here, and the comments have been posted on the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* We have determined that the mitigation measures described here will effect the least practicable impact on the species or stocks and their habitats.

Comment 1: The Commission recommends that we require the Navy to use densities of 5.75 sea lions/km² for summer and fall and 2.51 sea lions/km² for winter and spring to re-estimate the number of sea lions that could be taken during the proposed activities.

Response: The density values cited by the Commission are found in the Navy Marine Species Density Database (Hanser *et al.,* 2012) and are derived from Navy surveys of San Diego Bay conducted from 2007–11 (n = 11). The methodology for take estimation proposed by the Navy and employed here uses those same data, with an additional year of survey results (2007–12; n = 16). The primary difference, however, is that we attempt to produce the most realistic take estimate possible by approximating conditions expected to be in effect during the project. Specifically, only those survey results during the in-water work window (n = 13) and from the specific action area are used, and we attempt to quantify the effect of relocating the primary attractant for the population of California sea lions resident in the action area—the Everingham Brothers bait barges.

During Navy surveys of the action area, an average abundance of approximately 63 California sea lions was observed (5.50 sea lions/km²), but an average of approximately 50 of these individuals was observed to be on or near the bait barges. Therefore, we believe it appropriate to account for the relocation of this attractant outside of the action area and assume that approximately 13 individuals would be present in the action area (1.18 sea lions/km²). The bait barges, which are essentially floating pens filled with fish, provide a large haul-out area for sea lions but, importantly, they also provide a foraging opportunity. Therefore, while we recognize that the Commission has a valid point—that although the bait barges will be relocated outside the action area, some of the sea lions could still transit through the action area—we believe that the unique nature of the bait barges as both haul-out and de facto foraging hotspot for animals resident to San Diego Bay means that the majority of those individuals will remain in the vicinity of the bait barges. It would produce a grossly exaggerated estimate of take to ignore the relocation. Required marine mammal monitoring will determine whether this assumption is accurate or not and, if not, the approach to take estimation will be revised in future years of this project.

Finally, the Commission points out that this approach produces a density estimate that is reduced by as much as a factor of five, depending on seasonality. For California sea lions, an increase in the currently authorized level of take (994 incidences) by a factor of five would not affect either our small numbers finding or our negligible impact determination. However, we believe the approach to take estimation described here to be appropriate to produce the most accurate estimate.

Comment 2: The Commission recommends that we require the Navy to implement soft start procedures after 15 minutes if pile driving or removal is delayed or shut down because of the presence of a marine mammal within or approaching the shutdown zone.

Response: We do not believe the recommendation would be effective in reducing the number or intensity of incidents of harassment—in fact, we believe that implementation of this recommendation may actually increase the number of incidents of harassment by extending the overall project duration—while imposing a high cost in terms of operational practicability. We note here that, while the Commission recommends use of the measure to avoid serious injury (i.e., injury that will result in death of the animal), such an outcome is extremely unlikely even in the absence of any mitigation measures (as described in the FR notice). Rather than disregard the recommendation as not germane, we address our response to the potential usefulness of the measure in avoidance of non-serious injury (i.e., Level A harassment).

Soft start is required for the first impact pile driving of each day and, subsequently, after any impact pile driving stoppage of 30 minutes or greater. The purpose of a soft start is to provide a ''warning'' to animals by initiating the production of underwater sound at lower levels than are produced at full operating power. This warning is presumed to allow animals the opportunity to move away from an unpleasant stimulus and to potentially reduce the intensity of behavioral reactions to noise or prevent injury of animals that may remain undetected in the zone ensonified to potentially injurious levels. However, soft start requires additional time, resulting in a larger temporal footprint for the project. That is, soft start requires a longer cumulative period of pile driving (i.e., hours) but, more importantly, leads to a longer overall duration (i.e., more days on which pile driving occurs). In order to maximize the effectiveness of soft start while minimizing the implementation costs, we require soft start after a period of extended and unobserved relative silence (i.e., at the beginning of the day, after the end of the required 30-minute post-activity monitoring period, or after 30 minutes with no impact driving). It is after these periods that marine mammals are more likely to closely approach the site (because it is relatively quiet) and less likely to be observed prior to initiation of the activity (because continuous monitoring has been interrupted).

The Commission justifies this recommendation on the basis of the potential for undetected animals to remain in the shutdown zone, and describes various biases (i.e., availability, detection, and perception) on an observer's ability to detect an animal. We do not believe that time is a factor in determining the influence of these biases on the probability of observing an animal in the shutdown zone. That is, an observer is not more likely to detect the presence of an animal at the 15-minute mark of continuous monitoring than after 30 minutes (it is established that soft start is required after any unmonitored period). Therefore, requiring soft start after 15 minutes (i.e., more soft starts) is not likely to result in increased avoidance of injury. Finally, we do not believe that the use of soft start may be expected to appreciably reduce the potential for injury where the probability of detection is high (e.g., small, shallow zones with good environmental conditions). Rather, the primary purpose of soft start under such conditions is to reduce the intensity of potential behavioral reactions to underwater sound in the disturbance zone.

As noted by the Commission, there are multiple reasons why marine mammals may remain in a shutdown zone and yet be undetected by observers. Animals are missed because they are underwater (availability bias) or because they are available to be seen, but are missed by observers (perception and detection biases) (e.g., Marsh and Sinclair, 1989). Negative bias on perception or detection of an available animal may result from environmental conditions, limitations inherent to the observation platform, or observer ability. While missed detections are possible in theory, this would require that an animal would either (a) remain submerged (i.e., be unavailable) for periods of time approaching or exceeding 15 minutes and/or (b) remain undetected while at the surface. We provide further site-specific detail below.

First, environmental conditions in San Diego Bay are typically excellent and, unlike the moving aerial or vessel-based observation platforms for which detectability bias is often a concern, the observers here will be positioned in the most suitable locations to ensure high detectability (randomness of observations is not a concern, as it is for abundance sampling). We believe that the probability of detecting an animal within the 190 dB zone is 100 percent and, even in the larger 180 dB zone, we believe that under similar circumstances the appropriate monitoring strategy will allow detection of marine mammals. Biologists conducting Navy marine mammal surveys in the action area from 2007–12 believe that the detectability of animals within the study area at the time the surveys were conducted approached 100 percent. Regarding availability, the most abundant species, and therefore the species most likely to be present in the mitigation zones, are the California sea lion and bottlenose dolphin.

It is extremely unlikely that a pinniped would remain within approximately 40 m (the radial distance to the shutdown zone for pinnipeds is 36 m) of a construction zone and area of high vessel traffic, in the absence of any known foraging opportunities or other attractant of any significance, for an extended period of time. However, in the event that such an unlikely situation occurred, the possibility that individuals would remain submerged for a period of time exceeding 15 minutes is discountable. Sea lions employ a shallow epipelagic foraging strategy, and numerous studies have reported mean dive times of approximately 2 minutes for California sea lions (e.g., Feldkamp *et al.,* 1989 [mean dive time less than 3 min]; Weise *et al.,* 2006 [mean dive time 1.9 ± 1.6 min]). Kuhn *et al.* (2003) cite published values for sea lion aerobic dive limits ranging from 2.3–5.8 minutes and, while it is possible that sea lions may dive beyond these limits when foraging on the benthos, significantly longer dive durations would not be expected in shallow waters. In addition, while short surface intervals are also possible, longer values are typical of data found in the literature for animals engaged in foraging (e.g., Costa *et al.* (2007) report a mean surface interval of 1.6 minutes). Sea lions will typically spend a much greater proportion of time at the surface when not foraging. Under the typically excellent observation conditions found in San Diego Bay, we believe that these surfaced animals would be observed.

For bottlenose dolphins, a much greater proportion of time is typically spent submerged. However, dive intervals are also typically much shorter, meaning that surfacing occurs frequently. Mate et al. (1995) report a typical dive duration from another shallow bay (Tampa Bay) of only 25 seconds. Short dive duration coupled with a large average group size—approximately six during Navy surveys—means high availability and increased detectability. Based on the foregoing factors, we have high confidence in the ability of observers to detect marine mammals in the shutdown zones estimated for this project in San Diego Bay.

Comment 3: The Commission recommends that we require the Navy to monitor the extent of the disturbance zone using additional shore- or vessel-based observers beyond the waterfront restricted area to (1) determine the numbers of marine mammals taken during pile driving and removal activities and (2) characterize the effects on them.

Response: The Commission correctly notes that the proposed monitoring requirements for the proposed IHA did not specify the number or locations of observers. We have worked with the Navy to develop an appropriate monitoring strategy, as detailed in the Navy's Acoustic and Marine Mammal Monitoring Plan and now available at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* In summary, at least one observer will be placed in the immediate vicinity of the active pile driving rig to observe the shutdown zones, while three additional observers will be placed on vessels at various locations throughout the action area to provide additional observation capability for the cetacean shutdown zone for impact driving and to monitor and record presence of marine mammals in the larger Level B harassment zone for vibratory pile driving. Only one observer will be required for monitoring at the MMP relocation site, as the shutdown zones are the minimum 10 m and the 160 dB Level B harassment zone has a radial distance of only 84 m. We agree with the Commission's recommendation and believe that the Monitoring Plan is sufficient to accomplish these objectives.

Description of Marine Mammals in the Area of the Specified Activity

There are four marine mammal species which are either resident or have known seasonal occurrence in San Diego Bay, including the California sea lion, harbor seal, bottlenose dolphin, and gray whale. In addition, Pacific white-sided and common dolphins (*Lagenorhynchus obliquidens* and *Delphinus* sp., respectively) have been observed in nearshore coastal waters in the vicinity, but have no known occurrence in San Diego Bay or near the project area. None of these species are listed under the Endangered Species Act (ESA). The FR notice (78 FR 30873; May 23, 2013) summarizes the population status and abundance of these species, and the Navy's application provides detailed life history information.

Potential Effects of the Specified Activity on Marine Mammals

We have determined that pile driving, as outlined in the project description, has the potential to result in behavioral harassment of marine mammals that may be present in the project vicinity while construction activity is being conducted. Pile driving could potentially harass those pinnipeds that are in the water close to the project site, whether exposed to airborne or underwater sound. The FR notice (78 FR 30873; May 23, 2013) provides a detailed description of marine mammal hearing and of the potential effects of these construction activities on marine mammals.

Anticipated Effects on Habitat

The specified activities at NBPL will not result in permanent impacts to habitats used directly by marine mammals, such as haul-out sites, but may have potential short-term impacts to food sources such as forage fish. There are no rookeries or major haul-out sites nearby (the bait barges will be relocated from the project area), foraging hotspots, or other ocean bottom structure of significant biological importance to marine mammals that may be present in the marine waters in the vicinity of the project area. Therefore, the main impact issue associated with the specified activity will be temporarily elevated sound levels and the associated direct effects on marine mammals. The most likely impact to marine mammal habitat occurs from pile driving effects on likely marine mammal prey (i.e., fish) near NBPL and minor impacts to the immediate substrate during installation and removal of piles during the pier replacement project. The FR notice (78 FR 30873; May 23, 2013) describes these potential impacts in greater detail.

Mitigation

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(D) of the MMPA, we must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant).

Proxy source measurements and site-specific modeling of spreading loss (with the exception of the MMP relocation site, where practical spreading loss was assumed) were used to estimate zones of influence (ZOIs; see ''Estimated Take by Incidental Harassment''); these values were used to develop mitigation measures for pile driving activities at NBPL. The ZOIs effectively represent the mitigation zones that will be established around each pile to prevent Level A harassment to marine mammals, while providing estimates of the areas within which Level B harassment might occur. In addition to the measures described later in this section, the Navy will employ the following standard mitigation measures:

(a) Conduct briefings between construction supervisors and crews, marine mammal monitoring team, acoustical monitoring team, and Navy staff prior to the start of all pile driving activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

(b) Comply with applicable equipment sound standards and ensure that all construction equipment has sound control devices no less effective than those provided on the original equipment.

(c) For in-water heavy machinery work with the potential to affect marine mammals (other than pile driving), if a marine mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions. This type of work could include the following activities: (1) movement of the barge to the pile location and (2) removal of the pile from the water column/substrate via a crane (i.e., deadpull). For these activities, monitoring will take place from 15 minutes prior to initiation until the action is complete.

Monitoring and Shutdown for Pile Driving

The following measures will apply to the Navy's mitigation through shutdown and disturbance zones:

Shutdown Zone—For all pile driving and removal activities, the Navy will establish a shutdown zone intended to contain the area in which SPLs equal or exceed the 180/190 dB rms acoustic injury criteria. The purpose of a shutdown zone is to define an area within which shutdown of activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area), thus preventing injury, serious injury, or death of marine mammals. Radial distances for shutdown zones are shown in Table 2. For certain pile types or techniques, the shutdown zone would not exist because source levels are lower than the threshold (see Table 2). However, a minimum shutdown zone of 10 m will be established during all pile driving and removal activities, regardless of the estimated zone. These precautionary measures are intended to prevent the already unlikely possibility of physical interaction with construction equipment and to further reduce any possibility of acoustic injury.

Disturbance Zone—Disturbance zones are typically defined as the area in which SPLs equal or exceed 160 or 120 dB rms (for pulsed or non-pulsed sound, respectively). Disturbance zones provide utility for monitoring conducted for mitigation purposes (i.e., shutdown zone monitoring) by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring of disturbance zones enables observers to be aware of and communicate the presence of marine mammals in the project area but outside the shutdown zone and thus prepare for potential shutdowns of activity. However, the primary purpose of disturbance zone monitoring is for documenting incidents of Level B harassment; disturbance zone monitoring is discussed in greater detail later (see ''Monitoring and Reporting''). Nominal radial distances for disturbance zones are shown in Table 2. As with any such large action area, it is impossible to guarantee that all animals will be observed or to make comprehensive observations of fine-scale behavioral reactions to sound.

In order to document observed incidences of harassment, monitors record all marine mammal observations, regardless of location. The observer's location, as well as the location of the pile being driven, is known from a GPS. The location of the animal is estimated as a distance from the observer, which is then compared to the location from the pile. If acoustic monitoring is being conducted for that pile, a received SPL may be estimated, or the received level may be estimated on the basis of past or subsequent acoustic monitoring. It may then be determined whether the animal was exposed to sound levels constituting incidental harassment in post-processing of observational and acoustic data, and a precise accounting of observed incidences of harassment created. Therefore, although the predicted distances to behavioral harassment thresholds are useful for estimating incidental harassment for purposes of authorizing levels of incidental take, actual take may be determined in part through the use of empirical data. That information may then be used to extrapolate observed takes to reach an approximate understanding of actual total takes.

Monitoring Protocols—Monitoring will be conducted before, during, and after pile driving activities. In addition, observers shall record all incidences of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven. Observations made outside the shutdown zone will not result in shutdown; that pile segment would be completed without cessation, unless the animal approaches or enters the shutdown zone, at which point all pile driving activities would be halted. Please see the Acoustic and Marine Mammal Monitoring Plan (available at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*), developed by the Navy in agreement with NMFS, for full details of the monitoring protocols. Monitoring will take place from 15 minutes prior to initiation through 30 minutes post-completion of pile driving activities. Pile driving activities include the time to remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

The following additional measures apply to visual monitoring:

(1) Monitoring will be conducted by qualified observers, who will be placed at the best vantage point(s) practicable (as defined in the Navy's Monitoring Plan) to monitor for marine mammals and implement shutdown/delay procedures when applicable by calling for the shutdown to the hammer operator. Qualified observers are trained biologists, with the following minimum qualifications:

- Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;
- Advanced education in biological science, wildlife management, mammalogy, or related fields (bachelor's degree or higher is required);
- Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience);
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates and times when in-water construction activities were suspended to avoid potential incidental injury from construction sound of marine mammals observed within a defined shutdown zone; and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

(2) Prior to the start of pile driving activity, the shutdown zone will be monitored for 15 minutes to ensure that it is clear of marine mammals. Pile driving will only commence once observers have declared the shutdown zone clear of marine mammals; animals will be allowed to remain in the shutdown zone (i.e., must leave of their own volition) and their behavior will be monitored and documented. The shutdown zone may only be declared clear, and pile driving started, when the entire shutdown zone is visible (i.e., when not obscured by dark, rain, fog, etc.). In addition, if such conditions should arise during impact pile driving that is already underway, the activity will be halted.

(3) If a marine mammal approaches or enters the shutdown zone during the course of pile driving operations, activity will be halted and delayed until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal. Monitoring will be conducted throughout the time required to drive a pile.

Timing Restrictions

The Navy has set timing restrictions for pile driving activities to avoid in-water work when least tern populations are most likely to be foraging and nesting. The in-water work window for avoiding negative impacts to terns is September 16–March 31. All pile driving will be conducted only during daylight hours.

Soft Start

The use of a soft-start procedure is believed to provide additional protection to marine mammals by warning or providing a chance to leave the area prior to the hammer operating at full capacity, and typically involves a requirement to initiate sound from vibratory hammers for fifteen seconds at reduced energy followed by a 30-second waiting period. This procedure is repeated two additional times. However, implementation of soft start for vibratory pile driving during previous pile driving work conducted by the Navy at another location has led to equipment failure and serious human safety concerns. Therefore, although vibratory soft start was proposed for implementation in the FR notice (78 FR 30873; May 23, 2013), it is not required as a mitigation measure for this project, as we have determined it not to be practicable. We have further determined this measure unnecessary to providing the means of effecting the least practicable impact on marine mammals and their habitat. For impact driving, soft start will be required, and contractors will provide an initial set of three strikes from the impact hammer at 40 percent energy, followed by a 30-second waiting period, then two subsequent three strike sets.

We have carefully evaluated the applicant's mitigation measures and considered a range of other measures in the context of ensuring that we prescribe 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: (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, including consideration of personnel safety, and practicality of implementation.

Based on our evaluation of the applicant's planned measures, as well as any other potential measures that may be relevant to the specified activity, we have determined that these 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.

Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that we 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 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. Please see the Navy's Acoustic and Marine Mammal Monitoring Plan for full details of the requirements for monitoring and reporting. We have determined that this monitoring plan, which is summarized here, is sufficient to meet the MMPA's monitoring and reporting requirements.

Acoustic Measurements

The primary purpose of acoustic monitoring is to empirically verify modeled injury and behavioral disturbance zones for marine mammals. The Navy will determine actual distances to the 160-, 180-, and 190-dB zones for underwater sound (where applicable) and to the 90- and 100-dB zones for airborne sound. For non-pulsed sound, distances will be determined for attenuation to the greater of either the 120-dB threshold or to the point at which sound becomes indistinguishable from background levels. Acoustic monitoring will be conducted with the following objectives:

(a) Indicator Pile Program (IPP)—Implement a robust in-situ monitoring effort to measure sound pressure levels from different project activities, including impact and vibratory driving of 36- and 48-in piles, and to validate the Navy's site-specific transmission loss modeling effort.

(b) Conduct acoustic monitoring for vibratory pile extraction and for pneumatic chipping, if used.

(c) Continue the Navy's collection of ambient underwater sound measurements in the absence of project activities to develop a rigorous baseline for the San Diego Bay region.

It is assumed that the measured contours will be significantly reduced compared to the conservatively modeled ZOIs. As statistically robust results from acoustic monitoring become available, marine mammal mitigation zones will be revised as necessary to encompass actual ZOIs in subsequent years of the fuel pier replacement project. However, should substantial discrepancies become evident through limited data processing, the Navy will contact NMFS to propose and discuss appropriate changes in monitoring protocols. Acoustic monitoring will be conducted in accordance with the approved Acoustic and Marine Mammal Monitoring Plan developed by the Navy. Notional monitoring locations are shown in Figures 3–1 and 3–2 of the Navy's Plan. Please see that plan, available at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm,* for full details of the required acoustic monitoring.

Some details of the methodology include:

- Hydroacoustic monitoring will be conducted for each different type of pile and each different method of installation and removal. Monitoring will occur across a representative range of locations with special attention given to the 120-, 160-, 180-, and 190-dB ZOI contours. The resulting data set will be analyzed to provide a statistically robust characterization of the sound source levels and transmission loss associated with different types of pile driving and removal activities.
- For underwater recordings, hydrophone systems with the ability to measure real time SPLs will be used in accordance with NMFS' most recent guidance for the collection of source levels.
- For airborne recordings, to the extent that logistics and security allow, reference recordings will be collected at approximately 50 ft (15.2 m) from the source via a sound meter with integrated microphone placed on a tripod 5 ft above the ground. Other distances may also be utilized to obtain better data if the signal cannot be isolated clearly due to other sound sources (i.e., barges or generators). If from a distance other than 50 ft, the source data would be converted to the 50-ft distance based on simple spherical spreading.
- Hydrophones will be placed 10 m from the source and within the ZOIs to their predicted eastern and southern limits. An integrated DGPS will record the location of individual acoustic records. A depth sounder or weighted tape measure will be used to determine the depth of the water. The hydrophone will be attached to a weighted line to maintain a constant depth.
- Each hydrophone (underwater) and microphone (airborne) will be calibrated at the beginning of each day of monitoring activity. Pressure and intensity levels will be reported relative to 1 μPa and 1 μPa^2, respectively.
- For each monitored location, a hydrophone will be deployed at mid-depth in order to evaluate site specific attenuation and propagation characteristics.
- In order to determine the area encompassed by the relevant isopleths for marine mammals, hydrophones will collect data at various distances from the source to measure attenuation throughout the ZOIs.
- Ambient conditions, both airborne and underwater, will be measured at the same monitoring locations but in the absence of project sound to determine background sound levels. Ambient levels are intended to be recorded over the frequency range from 7 Hz to 20 kHz. Ambient conditions will be recorded for at least one minute every hour of the work day, for at least one week of each month of the period of the IHA.
- Sound levels associated with soft-start techniques will also be measured but will be differentiated from source level measurements.
- Airborne levels will be recorded as unweighted as well as in dBA, and the distance to marine mammal injury and behavioral disturbance thresholds, also referred to as shutdown and buffer zones, would be measured.
- Environmental data will be collected including but not limited to: wind speed and direction, air temperature, humidity, surface water temperature, water depth, wave height, weather conditions and other factors that could contribute to influencing the airborne and underwater sound levels (e.g., aircraft, boats, etc.).

Visual Marine Mammal Observations

The Navy will collect sighting data and behavioral responses to construction for marine mammal species observed in the region of activity during the period of activity. All observers will be trained in marine mammal identification and behaviors and are required to have no other construction-related tasks while conducting monitoring. The Navy will monitor the shutdown zone and disturbance zone before, during, and after pile driving as described under ''Mitigation'' and in the Acoustic and Marine Mammal Monitoring Plan. Notional monitoring locations are shown in Figures 3–1 and 3–2 of the Navy's Plan. Please see that plan, available at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm,* for full details of the required marine mammal monitoring. Based on our requirements, the Plan includes the following procedures for pile driving:

- MMOs would be located at the best vantage point(s) in order to properly see the entire shutdown zone and as much of the disturbance zone as possible.
- During all observation periods, observers will use binoculars and the naked eye to search continuously for marine mammals.
- If the shutdown zones are obscured by fog or poor lighting conditions, pile driving at that location will not be initiated until that zone is visible. Should such conditions arise while impact driving is underway, the activity will be halted.
- The shutdown and disturbance zones around the pile will be monitored for the presence of marine mammals before, during, and after any pile driving or removal activity.

Individuals implementing the monitoring protocol will assess its effectiveness using an adaptive approach. Monitoring biologists will use their best professional judgment throughout implementation and seek improvements to these methods when deemed appropriate. Any modifications to protocol will be coordinated between NMFS and the Navy.

Data Collection

We require that observers use approved data forms. Among other pieces of information, the Navy will record detailed information about any implementation of shutdowns, including the distance of animals to the pile and description of specific actions that ensued and resulting behavior of the animal, if any. In addition, the Navy will attempt to distinguish between the number of individual animals taken and the number of incidences of take. We require that, at a minimum, the following information be collected on the sighting forms:

- Date and time that monitored activity begins or ends;
- Construction activities occurring during each observation period;
- Weather parameters (e.g., percent cover, visibility);
- Water conditions (e.g., sea state, tide state);
- Species, numbers, and, if possible, sex and age class of marine mammals;
- Description of any observable marine mammal behavior patterns, including bearing and direction of travel, and if possible, the correlation to SPLs;
- Distance from pile driving activities to marine mammals and distance from the marine mammals to the observation point;
- Locations of all marine mammal observations; and
- Other human activity in the area.

In addition, photographs will be taken of any gray whales observed. These photographs will be submitted to NMFS' Southwest Regional Office for comparison with photo-identification catalogs to determine whether the whale is a member of the western North Pacific population.

Reporting

A draft report must be submitted to NMFS within 45 calendar days of the completion of acoustic measurements and marine mammal monitoring. The report will include marine mammal observations pre-activity, during-activity, and post-activity during pile driving days, and will also provide descriptions of any adverse responses to construction activities by marine mammals and a complete description of all mitigation shutdowns and the results of those actions and a refined take estimate based on the number of marine mammals observed during the course of construction. A final report must be submitted within 30 days following resolution of comments on the draft report. Required contents of the monitoring reports are described in more detail in the Navy's Acoustic and Marine Mammal Monitoring Plan.

Estimated Take by Incidental Harassment

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].''

All anticipated takes will be by Level B harassment, involving temporary changes in behavior. The planned mitigation and monitoring measures are expected to minimize the possibility of injurious or lethal takes such that take by Level A harassment, serious injury or mortality is considered discountable. However, it is unlikely that injurious or lethal takes would occur even in the absence of the planned mitigation and monitoring measures.

If a marine mammal responds to a stimulus by changing its behavior (e.g., through relatively minor changes in locomotion direction/speed or vocalization behavior), the response may or may not constitute taking at the individual level, and is unlikely to affect the stock or the species as a whole. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on animals or on the stock or species could potentially be significant (Lusseau and Bejder, 2007; Weilgart, 2007). Given the many uncertainties in predicting the quantity and types of impacts of sound on marine mammals, it is common practice to estimate how many animals are likely to be present within a particular distance of a given activity, or exposed to a particular level of sound. This practice potentially overestimates the numbers of marine mammals taken.

The project area is not believed to be particularly important habitat for marine mammals, nor is it considered an area frequented by marine mammals (with the exception of California sea lions). The occurrence of California sea lions in the project area, and, therefore, the likely incidence of exposure of sea lions to sound levels above relevant thresholds, will be much reduced due to the relocation of the bait barges (i.e., significant California sea lion haul-outs). Therefore, behavioral disturbances that could result from anthropogenic sound associated with these activities are expected to affect only a relatively small number of individual marine mammals, although those effects could be recurring over the life of the project if the same individuals remain in the project vicinity.

The Navy has requested authorization for the potential taking of small numbers of California sea lions, harbor seals, bottlenose dolphins, and gray whales in San Diego Bay that may result from pile driving during construction activities associated with the fuel pier replacement project described previously in this document.

Marine Mammal Densities

For all species, the best scientific information available was used to construct density estimates or estimate local abundance. Although information exists for regional offshore surveys for marine mammals, it is unlikely that these data would be representative of the fauna that may be encountered in San Diego Bay. As a result, the data resulting from dedicated line-transect surveys conducted by the Navy from 2007–12, or from opportunistic observations for more rarely observed species, was deemed most appropriate for use in estimating the number of incidental harassments that may occur as a result of the specified activities (see Figures 3–1 and 3–2 of the Navy's application). Boat survey transects established within northern San Diego Bay in 2007 have been resurveyed on 16 occasions, 13 of which were during the seasonal window for in-water construction and demolition (September–April).

Description of Take Calculation

The take calculations presented here rely on the best data currently available for marine mammal populations in San Diego Bay. The methodology for estimating take was described in detail in the FR notice (78 FR 30873; May 23, 2013). The ZOI impact area is the estimated range of impact to the sound criteria. The distances (actual) specified in Table 2 were used to calculate ZOI around each pile. The ZOI impact area took into consideration the possible affected area of San Diego Bay with attenuation due to land shadowing from bends in the shoreline. Because of the close proximity of some of the piles to the shore, the ZOIs for each threshold are not necessarily spherical and may be truncated.

While pile driving can occur any day throughout the in-water work window, and the analysis is conducted on a per day basis, only a fraction of that time is actually spent pile driving. The exposure assessment methodology is an estimate of the numbers of individuals exposed to the effects of pile driving activities exceeding NMFS-established thresholds. Of note in these exposure estimates, mitigation methods (i.e., visual monitoring and the use of shutdown zones) were not quantified within the assessment and successful implementation of mitigation is not reflected in exposure estimates. For the reasons noted above, results from this acoustic exposure assessment likely overestimate take estimates to some degree.

Airborne Sound—No incidents of incidental take resulting solely from airborne sound are expected. Distances to the harassment thresholds are generally not expected to reach areas where pinnipeds may haul out (but see below regarding harbor seals). We recognize that pinnipeds in the water could be exposed to airborne sound that may result in behavioral harassment when looking with heads above water. However, these animals would previously have been incidentally taken as a result of exposure to underwater sound above the behavioral harassment thresholds, which are in all cases larger than those associated with airborne sound. Thus, the behavioral harassment of these animals is already accounted for in these estimates of potential take. Multiple incidents of exposure to sound above NMFS' thresholds for behavioral harassment are not believed to result in increased behavioral disturbance, in either nature or intensity of disturbance reaction. Therefore, we do not believe that authorization of incidental take resulting from airborne sound for pinnipeds is warranted.

In the proposal for this IHA, because the nearest known haul-out location for harbor seals is approximately 250 m from the fuel pier and within the largest airborne ZOI, we did assume that individuals present could be incidentally taken by both underwater and airborne sound on each day. However, we have determined that this is not likely and is inconsistent with our past practice with regard to the potential for incidental taking by airborne sound. Because few harbor seals are likely to be present, and harbor seals readily flush from haul-outs in the presence of harassing stimuli, we believe that any harbor seals present at the haul-out would likely be exposed to potentially harassing levels of underwater sound in addition to the airborne sound. Therefore, our take proposal for harbor seals was an overestimate and double-counted potential incidences of harbor seal take.

The derivation of density or abundance estimates for each species, as well as further description of the rationale for each take estimate, was described in detail in the FR notice (78 FR 30873; May 23, 2013). A summary of the information and assumptions that went into take estimates for each species is provided here. Total take estimates are presented in Table 3.

- California sea lion—For California sea lions, the most common species in northern San Diego Bay and the only species with regular occurrence in the project area, it was determined that the density value derived from site-specific surveys would be most appropriate for use in estimating potential incidences of take. Corrected survey data indicate an average abundance in the project area of 63 individuals; however, an average of 47 animals was observed on or swimming next to the bait barges. Assuming the same proportion of the population continues to congregate at the bait barges when they are relocated, there would be an average of approximately 13 individuals within the ZOI without the bait barges' influence as a sea lion aggregator.
- Bottlenose dolphin—Given the sporadic nature of bottlenose dolphin sightings and their high variability in terms of numbers and locations, the regional density estimate of 0.36/km^2 developed for the NMSDD (Hanser et al., 2012) was considered a more reliable indicator than the results of site-specific surveys of the number of bottlenose dolphins that may be present and is used here to estimate the potential number of incidences of take.
- Harbor seal—Harbor seal presence in the project area is assessed on the basis of the only observational data available, the opportunistic observation of several individuals occurring in the vicinity of Pier 122 repeatedly for a period of about a month. We therefore assume that as many as three harbor seals could be incidentally harassed on a daily basis for as much as one month.
- Gray whale—On the basis of limited information, we assume here that 15 exposures of gray whales to sound that could result in harassment might occur. This could result from as many as 15 individuals transiting near the mouth of the Bay, or from one individual entering the Bay and lingering in the project area for 15 days. We limit the time period to 15 days because, although both of these scenarios are unlikely, they would only possibly occur in March. Most sightings of gray whales near or within the Bay have been outside of the in-water work window.

Steel pile installation involves a combination of vibratory and impact hammering. Both are assumed to occur on the same day and, therefore, the estimated number of animals taken is given by the maximum of either type of exposure. Given that the vibratory (120 dB rms) ZOI is larger, all animals considered behaviorally harassed by impact pile driving are also considered to potentially be harassed by vibratory pile driving, whereas animals outside of the ZOI for impact hammering but within the ZOI for vibratory hammering would only be harassed by the latter. For example, for California sea lions the estimate for vibratory pile driving is 700 and the estimate for impact pile driving is 500. Because both events occur on the same day and the vibratory harassment zone subsumes the impact harassment zone, the estimate for vibratory pile driving necessarily includes the 500 incidents of harassment estimated for impact pile driving alone. To provide a more conservative estimate of total harassments, demolition use of vibratory extraction is assumed not to overlap the driving of steel piles for the new pier. Thus, the 294 incidences of harassment for California sea lions resulting from pile removal would add to the 700 estimated for pile installation (500 resulting from either vibratory or impact installation and 200 resulting from vibratory installation alone) for a total estimate of 994 incidences of harassment.

TABLE 3—NUMBER OF POTENTIAL INCIDENTAL TAKES OF MARINE MAMMALS WITHIN VARIOUS ACOUSTIC THRESHOLD ZONES

Species	Density (#/km²)	Underwater				Airborne	Total authorized takes
		Impact injury threshold (180/190 dB)	Disturbance threshold, combined impact/vibratory (160 dB) [1]	Vibratory injury threshold (180/190 dB)	Vibratory disturbance threshold (120 dB)	Impact disturbance threshold (90/100 dB)	
California sea lion	1.18	0	500	0	494	0	994
Harbor seal [2]	n/a	0	90	0	0	[3] 90	90
Gray whale [2]	n/a	0	15	0	0	N/A	15
Bottlenose dolphin	0.36	0	144	0	163	N/A	307

[1] The 160-dB acoustic harassment zone associated with impact pile driving will always be subsumed by the 120-dB harassment zone produced by vibratory driving. Therefore, total takes estimated for impact driving alone could occur as a result of either impact or vibratory driving.

[2] Because there is no density estimate available for harbor seals or gray whales, we cannot estimate takes separately for vibratory and impact pile driving. We simply assume here that these animals could be present within the project area for 30 (3 harbor seals) or 15 days (1 gray whale), respectively, and that they could be taken by impact or vibratory driving or vibratory removal. We also assume that mitigation measures would be effective in preventing Level A harassment for these species and believe a zero value for Level A harassments to be reasonable.

[3] Although the assumed harbor seal haul-out location is within the airborne ZOI, we believe that these individuals would likely flush or enter the water on their own during the course of a 24-hr period and be exposed to underwater sound. Therefore, only one incidence of taking per animal per day is considered under total authorized takes.

Negligible Impact and Small Numbers Analysis and Determinations

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS 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, intensity, and duration of Level B harassment; and (4) the context in which the take occurs.

Small Numbers Analysis

The numbers of animals authorized to be taken for California sea lions, harbor seals, and gray whales would be considered small relative to the relevant stocks or populations (each less than one percent) even if each estimated taking occurred to a new individual—an extremely unlikely scenario. However, for animals occurring in northern San Diego Bay, there will almost certainly be some overlap in individuals present day-to-day and, for harbor seals and gray whales, the estimates are explicitly assumed to represent repeated incidental taking of the same individuals (three harbor seals and one gray whale).

The number of authorized takes for bottlenose dolphins is higher relative to the total stock abundance estimate. However, these numbers represent the estimated incidences of take, not the number of individuals taken. That is, it is likely that a relatively small subset of California coastal bottlenose dolphins would be harassed by project activities. California coastal bottlenose dolphins range from San Francisco Bay to San Diego (and south into Mexico) and the specified activity will be stationary within an enclosed bay that is not recognized as an area of any special significance for coastal bottlenose dolphins (and is therefore not an area of dolphin aggregation, as evident in Navy observational records). We therefore believe that the estimated numbers of takes, were they to occur, likely represent repeated exposures of a much smaller number of bottlenose dolphins and that, based on the limited region of exposure in comparison with the known distribution of the coastal bottlenose dolphin, these estimated incidences of take represent small numbers of bottlenose dolphins.

Negligible Impact Analysis

Pile driving activities associated with the pier replacement project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment (behavioral disturbance) only, from airborne or underwater sounds generated from pile driving. Potential takes could occur if individuals of these species are present in the ensonified zone when pile driving is happening.

No injury, serious injury, or mortality is anticipated given the methods of installation and measures designed to minimize the possibility of injury to marine mammals. The potential for these outcomes is minimized through the construction method and the implementation of the planned mitigation measures. Specifically, vibratory hammers will be the primary method of installation, and this activity does not have significant potential to cause injury to marine mammals due to the relatively low source levels produced (less than 190 dB) and the lack of potentially injurious source characteristics. Impact pile driving produces short, sharp pulses with higher peak levels and much sharper rise time to reach those peaks. When impact driving is necessary, required measures (use of a sound attenuation system, which reduces overall source levels as well as dampening the sharp, potentially injurious peaks, and implementation of shutdown zones) significantly reduce any possibility of injury. Likewise, Level B harassment will be reduced to the level of least practicable adverse impact through the use of mitigation measures described herein that, given sufficient ''notice'' through mitigation measures including soft start (for impact driving), marine mammals are expected to move away from a sound source that is annoying prior to its becoming potentially injurious, and the likelihood that marine mammal detection ability by trained observers is high under the environmental conditions described for San Diego Bay, enabling the implementation of shutdowns to avoid injury, serious injury, or mortality.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring). Most likely, individuals will simply move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. The pile driving activities analyzed here are similar to numerous other construction activities conducted in San Francisco Bay and in the Puget Sound region, which have taken place with no reported injuries or mortality to marine mammals, and no known long-term adverse consequences from behavioral harassment. Repeated exposures of individuals to levels of sound that may cause Level B harassment are unlikely to result in hearing impairment or to significantly disrupt foraging behavior. Thus, even repeated Level B harassment of some small subset of the overall stock is unlikely to result in any significant realized decrease in viability for California coastal bottlenose dolphins, and thus would not result in any adverse impact to the stock as a whole. For pinnipeds, no rookeries are present in the project area, there are no haul-outs other than those provided opportunistically by man-made objects (the primary such haul-out, the bait barges, will be relocated away from the project area), and the project area is not known to provide foraging habitat of any special importance.

In summary, this negligible impact analysis is founded on the following factors: (1) The possibility of injury, serious injury, or mortality may reasonably be considered discountable; (2) the anticipated incidences of Level B harassment consist of, at worst, temporary modifications in behavior; (3) the absence of any major rookeries and only a few isolated and opportunistic haul-out areas near or adjacent to the project site; (4) the absence of any other known areas or features of special significance for foraging or reproduction within the project area; (5) the presumed efficacy of the planned mitigation measures in reducing the effects of the specified activity to the level of least practicable impact. In addition, none of these stocks are listed under the ESA or considered of special status (e.g., depleted or strategic) under the MMPA. California sea lions and harbor seals (in California) are thought to have reached or to be approaching carrying capacity, while gray whales are thought to be increasing. The California coastal stock of bottlenose dolphins remained stable during the most recent period of trend analysis. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activity will have only short-term effects on individuals. The specified activity is not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

Determinations

The number of marine mammals actually incidentally harassed by the project will depend on the distribution and abundance of marine mammals in the vicinity of the survey activity. However, we find that the number of potential takings authorized (by level B harassment only), which we consider to be a conservative, maximum estimate, is small relative to the relevant regional stock or population numbers, and that the effect of the activity will be mitigated to the level of least practicable impact through implementation of the mitigation and monitoring measures described previously. Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, we find that the total taking from the activity 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.

Endangered Species Act (ESA)

The Navy initiated informal consultation under section 7 of the ESA with NMFS' Southwest Regional Office on March 5, 2013. NMFS concluded on May 16, 2013, that the proposed action may affect, but is not likely to adversely affect, western North Pacific gray whales. The Navy has not requested authorization of the incidental take of WNP gray whales and no such authorization is issued. There are no other ESA-listed marine mammals found in the action area. Therefore, no consultation under the ESA is required.

National Environmental Policy Act (NEPA)

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), as implemented by the regulations published by the Council on Environmental Quality (40 CFR parts 1500–1508), the Navy prepared an Environmental Assessment (EA) to consider the direct, indirect and cumulative effects to the human environment resulting from the pier replacement project. NMFS made the Navy's EA available to the public for review and comment, in relation to its suitability for adoption by NMFS in order to assess the impacts to the human environment of issuance of an IHA to the Navy. Also in compliance with NEPA and the CEQ regulations, as well as NOAA Administrative Order 216–6, NMFS has reviewed the Navy's EA, determined it to be sufficient, and adopted that EA and signed a Finding of No Significant Impact (FONSI) on July 8, 2013. The Navy's EA and NMFS' FONSI for this action may be found at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

Authorization

As a result of these determinations, we have issued an IHA to the Navy to conduct the specified activities in San Diego Bay for one year, from September 1, 2013, through August 31, 2014, provided the previously described mitigation, monitoring, and reporting requirements are incorporated.

Dated: July 19, 2012.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–17760 Filed 7–23–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2011–OS–0015]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by August 23, 2013.

Title, Associated Form and OMB Number: Application for Former Spouse

Payments From Retired Pay; DD Form 2293; OMB Control Number 0730–0008.

Type of Request: Reinstatement.

Number of Respondents: 29,127.

Responses per Respondent: 1.

Annual Responses: 29,127.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 7282 hours.

Needs and Uses: Under 10 U.S.C. 1408, state courts may divide military retired pay as property or order alimony and child support payment from that retired pay. The former spouse may apply to the Defense Finance and Accounting Service (DFAS) for direct payment of these monies by using DD Form 2293. This information collection is needed to provide DFAS the basic data needed to process the request.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: July 18, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–17678 Filed 7–23–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2013–OS–0157]

Proposed Collection; Comment Request

AGENCY: Transition to Veterans Program Office, Office of the Secretary of Defense for Personnel & Readiness, DoD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Transition to Veterans Program Office announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (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.

DATES: Consideration will be given to all comments received by September 23, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Center for Naval Analyses, ATTN: Mr. Jeffery Peterson, 4825 Mark Center Drive, Alexandria, VA 22311 or call Mr. Jeffery Peterson (703–824–2774) or Dr. Lauren Malone (703–824–2741).

Title; Associated Form; and OMB Number: Veterans' Community Reintegration Focus Groups; OMB Control Number: 0704–TBD.

Needs and Uses: The information collection requirement is necessary to help the Transition to Veterans Program Office identify the particular challenges and issues veterans face in reintegrating with their communities. These focus groups are necessary since there is no single, existing dataset that captures veterans' community reintegration, beyond measuring employment or education. Our findings will help inform the development and implementation of their new transition program, Transition GPS (Goals, Plans, Success).

Affected Public: Individuals and Households.

Annual Burden Hours: 225.

Number of Respondents: 150.

Responses per Respondent: 1.

Average Burden per Response: 90 minutes.

Frequency: One time.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

In order to populate our focus groups, we will work with veteran organizations, such as the Veterans of Foreign Wars, American Legion, and Student Veterans of America in the metro-DC area, to find participants for our groups. We will ask the organizations to help us gather groups of veterans who are less than two years removed from active duty and who volunteer to participate.

Upon arrival, we will ask the focus group participants to fill out a voluntary intake information sheet that asks for age, gender, race, education level, marital status, number of children, service affiliation, officer vs. enlisted, rank, and length of time since last active duty. At no point will participants be asked to provide their names or any other individual-level information other than what is listed here. The demographic information will only be used to show how our focus group samples compare to the overall demographics of recently transitioned veterans, and will not be linked to any participants' replies. This is essential for determining the comparability of our findings. If, for example, our focus groups were to consist largely of females, we would find it important to caveat the implications of our findings to the overall military, which is largely male. In addition, the new TAP program, Transition GPS, has a goal of diversifying its course offerings to meet the needs of all types of separating veterans, including first-term separations, mid-career separators, and career retirees. These groups are inherently different. First-term separators are the most likely to be immediately reentering the civilian labor market (and thus may be in need of skills training) and to be making use of their GI-Bills. They also have fewer experiences with significant transitions and life changes than their older, more tenured counterparts. Comparing the demographic characteristics of our focus group participants with those of first-term and other separators will allow us to determine if the inputs we receive are likely reflective of the population of transitioning veterans at large, or if they likely represent only specific subsets of the transitioning population.

We will audio tape these discussions so that transcription can occur after the discussions have been conducted. We will be certain that any introductions are made prior to the tape recorder being turned on, should the focus group members want to introduce themselves. Discussion topics will include:

- Organizations and social structures
- Community location decision
- Initial intentions after separation
- Reintegration challenges
- Transition Assistance Program (TAP) effect on reintegration
- Community involvement effect

Dated: July 10, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–17807 Filed 7–23–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2013–ICCD–0095]

Agency Information Collection Activities; Comment Request; Veterans Upward Bound Annual Performance Report

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before September 23, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0095 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E103, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: Electronically mail *ICDocketMgr@ed.gov.* Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Veterans Upward Bound Annual Performance Report.

OMB Control Number: 1840–NEW.

Type of Review: New information collection.

Respondents/Affected Public: Private Sector, State, Local, or Tribal Governments.

Total Estimated Number of Annual Responses: 51.

Total Estimated Number of Annual Burden Hours: 867.

Abstract: The U.S. Department of Education is requesting a new Annual Performance Report (APR) for grants under the Veterans Upward Bound (VUB) Program. The Department is requesting a new APR because of the implementation of the Higher Education Opportunity Act revisions to the Higher Education Act of 1965, as amended, the authorizing statute for the programs. The APRs are used to evaluate the performance of grantees prior to awarding continuation funding and to assess a grantee's prior experience at the end of each budget period.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–17801 Filed 7–23–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2013–ICCD–0096]

Agency Information Collection Activities; Comment Request; Early Childhood Longitudinal Study Kindergarten Class of 2010–11 (ECLS–K: 2011) Spring Third-Grade National Collection, Fourth-Grade Recruitment, and Fifth-Grade Tracking

AGENCY: Department of Education (ED), Institute of Education Sciences/National Center for Education Statistics (IES).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before September 23, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0096 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted*. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E103, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: Electronically mail

ICDocketMgr@ed.gov. Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Early Childhood Longitudinal Study Kindergarten Class of 2010–11 (ECLS–K:2011) Spring Third-Grade National Collection, Fourth-Grade Recruitment, and Fifth-Grade Tracking.

OMB Control Number: 1850–0790.

Type of Review: Revision of an existing information collection.

Respondents/Affected Public: Individuals or households.

Total Estimated Number of Annual Responses: 143,825.

Total Estimated Number of Annual Burden Hours: 52,702.

Abstract: The Early Childhood Longitudinal Study, Kindergarten Class of 2010–11 (ECLS–K:2011), sponsored by the National Center for Education Statistics (NCES) within the Institute of Education Sciences (IES) of the U.S. Department of Education (ED), is a survey that focuses on children's early school experiences beginning with kindergarten and continuing through the fifth grade. It includes the collection of data from parents, teachers, school administrators, and nonparental care providers, as well as direct child assessments. Like its sister study, the Early Childhood Longitudinal Study, Kindergarten Class of 1998–99 (ECLS–K), the ECLS–K:2011 is exceptionally broad in its scope and coverage of child development, early learning, and school progress, drawing together information from multiple sources to provide rich data about the population of children who were kindergartners in the 2010–11 school year. This submission requests OMBs clearance for (1) a spring 2014 third-grade national data collection; (2) recruitment for the spring 2015 fourth-grade data collection, and (3) tracking students for the spring 2016 fifth-grade data collection.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–17800 Filed 7–23–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2013–ICCD–0043]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Applications for Assistance Section 8002 Impact Aid Program

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before August 23, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0043 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E105,Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: Electronically mail *ICDocketMgr@ed.gov.* Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Applications for Assistance Section 8002 Impact Aid Program.

OMB Control Number: 1810–0036.

Type of Review: Extension without change of an existing collection of information.

Respondents/Affected Public: State, Local, or Tribal Governments.

Total Estimated Number of Annual Responses: 250.

Total Estimated Number of Annual Burden Hours: 375.

Abstract: The Application for Assistance under Section 8002 of Title VIII of the Elementary and Secondary Education Act is for a grant program otherwise known as Impact Aid Payments for Federal Property. Local Educational Agencies that have lost taxable property due to Federal activities request financial assistance by completing an annual application. Regulations for Section 8002 of the Impact Aid Program are found at 34 CFR part 222, subpart B, however these regulations have recently been superceded by Section 563 of the National Defense Authorization Act, signed January 2, 2013. The revised statute sets the eligibility criteria and the formula for determining grant payments under Section 8002. The revised application collects annual data required to calculate payments using the new formula.

Dated: July 18, 2013.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–17721 Filed 7–23–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 349–176]

Alabama Power Company; Notice of Application Accepted for Filing Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-project use of project lands and waters

b. *Project No:* 349–176

c. *Date Filed:* February 12, 2013, February 21, 2013, and May 9, 2013

d. *Applicant:* Alabama Power Company

e. *Name of Project:* Martin Dam Hydroelectric Project

f. *Location:* Lake Martin, Alexander City, Tallapoosa County, Alabama

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r)

h. *Applicant Contact:* Amy Stewart, Alabama Power Company, 600 18th Street North, Birmingham, Alabama, 35203 (205) 257–7116

i. *FERC Contact:* Jade Alvey, (202) 502–6864, *jade.alvey@ferc.gov*

j. *Deadline for filing comments, motions to intervene, and protests:* August 19, 2013

All documents may be filed electronically via the Internet. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–349–176) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Application:* Alabama Power Company requests Commission approval to permit Russell Crossroads to install new dock facilities at the area known as Crossroads Landing. The new facilities would consist of two floating docks with four double slips and two sets of mooring cleats, and one L-shaped floating dock with two double slips and two sets of mooring cleats. The three proposed docks would provide mooring for up to a total of twenty-five watercraft. The application also includes an existing three-slip dock with two sets of mooring cleats, and an L-shaped two-slip dock. Two existing small wooden docks would be removed prior to the three-phased development process proposed by the applicant. The application provides specific measurements for each structure, as well as their distance from the existing structures, and documentation of consultation.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field (P–349) to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: July 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–17725 Filed 7–23–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC13–128–000.

Applicants: Silver Merger Sub, Inc., Nevada Power Company, Sierra Pacific Power Company, NV Energy, Inc.

Description: Supplement adding MidAmerican Energy Holdings

Company as an Applicant to July 12, 2013 Joint Application for Authorization.

Filed Date: 7/17/13.

Accession Number: 20130717–5240.

Comments Due: 5 p.m. ET 9/10/13.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–979–004.

Applicants: Rocky Ridge Wind Project, LLC.

Description: Rocky Ridge Wind Project, LLC submits tariff filing per 35: Rocky Ridge Wind Project MBR Tariff Amendment to be effective 9/15/2013.

Filed Date: 7/17/13.

Accession Number: 20130717–5262.

Comments Due: 5 p.m. ET 8/7/13.

Docket Numbers: ER13–1989–000.

Applicants: Delta Person Limited Partnership.

Description: Notice of Cancellation of FERC Rate Schedule No. 1 of Delta Person Limited Partnership.

Filed Date: 7/17/13.

Accession Number: 20130717–5118.

Comments Due: 5 p.m. ET 8/7/13.

Docket Numbers: ER13–1990–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: Attachment T Revisions—Balanced Portfolio Reallocation to be effective 9/30/2013.

Filed Date: 7/17/13.

Accession Number: 20130717–5258.

Comments Due: 5 p.m. ET 8/7/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 17, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–17743 Filed 7–23–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER13–1986–000.

Applicants: PacifiCorp.

Description: Klamath Energy Construction Agreement to be effective 9/16/2013.

Filed Date: 7/16/13.

Accession Number: 20130716–5196.

Comments Due: 5 p.m. ET 8/6/13.

Docket Numbers: ER13–1987–000.

Applicants: Catalina Solar, LLC.

Description: Catalina Solar LLC Notice of Cancellation of Market-Based Rate Tariff to be effective 12/31/9998.

Filed Date: 7/16/13.

Accession Number: 20130716–5200.

Comments Due: 5 p.m. ET 8/6/13.

Docket Numbers: ER13–1988–000.

Applicants: Eligo Energy NY, LLC.

Description: Initial Eligo Energy Market Based Rate Filing to be effective 7/17/2013.

Filed Date: 7/17/13.

Accession Number: 20130717–5003.

Comments Due: 5 p.m. ET 8/7/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 17, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–17742 Filed 7–23–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP13–1080–000]

Chesapeake Energy Marketing, Inc. v. Midcontinent Express Pipeline LLC; Notice of Complaint

Take notice that on July 17, 2013, pursuant to sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717d, and Rule 206 of the Rules of Practice and Procedures of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.206, Chesapeake Energy Marketing, Inc. (CEMI or Complainant), filed a complaint against Midcontinent Express Pipeline LLC (MEP or Respondent), alleging that (1) the interpretation and application of the existing language of MEP's FERC Gas tariff is incorrect, unjust, and unreasonable, and (2) request the Commission to require MEP to provide CEMI with the reservation charge credits, as more fully described in the complaint.

The Complainant certify that copies of the complaint were served on the contacts for the Respondent as listed on the Commission's list of Corporate Officials and on parties of the regulatory agencies the Complainants reasonably expect to be affected by this complaint.

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. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

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 August 6, 2013.

Dated: July 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–17731 Filed 7–23–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM12–4–001]

Revision to Transmission Vegetation Management Reliability Standard; Notice of Compliance Filing

Take notice that on July 12, 2013, the North American Electric Reliability Corporation (NERC), pursuant to Order No. 777 [1] submitted a compliance filing: (1) Providing a description of NERC's plan to conduct testing to develop empirical data regarding the flashover distances between conductors and vegetation; (2) modifying the Violation Risk Factor for Requirement R2; and (3) confirming NERC has posted guidance materials for NERC Reliability Standard FAC–003–2 to its Web site.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at h*ttp://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 August 7, 2013.

Dated: July 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–17732 Filed 7–23–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER13–1906–000]

Guttman Energy Inc.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of Guttman Energy Inc.'s application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is August 7, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 18, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–17744 Filed 7–23–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13509–002]

Turnagain Arm Tidal Energy Corporation; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2013, the Turnagain Arm Tidal Energy Corporation, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Turnagain Arm Tidal Electric Generation Project (Turnagain Arm Project or project) to be located on the Turnagain Arm of Cook Inlet and adjacent lands of the Kenai Peninsula Borough and the Municipality of Anchorage, Alaska. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or

[1] *Revisions to Reliability Standard for Transmission Vegetation Management,* Order No. 777, 142 FERC ¶ 61,208 (2013).

otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) An 8-mile-long tidal fence situated between Fire Island near Anchorage and Point Possession in the Kenai Peninsula Borough, and consisting of 24, 10-megawatt (MW) Davis turbines with tidal-to-electrical energy generating units for a total installed capacity of 240 MW; (2) one control building/substation onshore near Anchorage and one near Point Possession; (3) an 18-mile-long, 230-kilovolt (kV) submerged transmission line connecting the tidal fence to the existing Chugach Electric Association substation at Point Woronzof in Anchorage and a new substation at Point Possession; (4) a 28-mile-long, 230-kV aboveground transmission line running parallel to an existing Homer Electric Association (HEA) transmission line corridor and extending from Point Possession to the existing HEA Nikiski substation; and (5) appurtenant facilities. The proposed project would have an estimated average annual generation of 1,271,950 megawatt-hours.

Applicant Contact: Mr. Dominic Lee, President and Chief Executive Officer, Turnagain Arm Tidal Energy Corporation, 821 N. Street, Suite 207, Anchorage, Alaska 99501; phone: (907) 274–7571.

FERC Contact: Kim Nguyen; phone: (202) 502–6105.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and five copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13509) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: July 18, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–17812 Filed 7–23–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR13–56–000]

Duke Energy Kentucky, Inc.; Notice of Petition for Rate Approval

Take notice that on July 15, 2013, Duke Energy Kentucky, Inc. filed a petition for rate approval pursuant to Section 284.123(b)(2) of the Commission's regulations for approval of a new rate applicable to interstate natural gas transportation service rendered under its Order No. 63 blanket certificate and to revise its Statement of Operating Conditions, as more fully detailed in the petition.

Any person desiring to participate in this rate filing 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). 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 date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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 Wednesday, July 31, 2013.

Dated: July 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–17726 Filed 7–23–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–515–000]

Stingray Pipeline Company, L.L.C.; Notice of Request Under Blanket Authorization

Take notice that on July 3, 2013, Stingray Pipeline Company, L.L.C. (Stingray), 1100 Louisiana Street, Houston, Texas 77002, filed in Docket No. CP13–515–000, a prior notice request pursuant to sections 157.205 and 157.216 of the Federal Energy Regulatory Commission's regulations under the Natural Gas Act for authorization to abandon a lateral located in West Cameron Blocks 144, 173, 180, and 181 in the federal waters offshore Louisiana. Specifically, Stingray proposes to abandon, by sale, its 4.55 mile, 16-inch lateral (WC 181 Lateral) to the connected producer, Black Elk Energy Offshore Operations, LLC (Black Elk). Black Elk intends to operate the lateral as part of its non-jurisdictional production facilities, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this Application should be directed to Cynthia Hornstein Roney, Manager, Regulatory Compliance, Stingray Pipeline Company, L.L.C., 1100 Louisiana, Suite 3300, Houston, Texas 77002, or call (832) 214–9334, or by email *cynthia.roney@enbridge.com.*

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

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.

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 commenter's 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 he Commission's environmental review process. Environmental commenter's will not be required to serve copies of filed documents on all other parties. However, the non-party commentary, will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*www.ferc.gov*) under the ''e-Filing'' link.

Dated: July 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–17728 Filed 7–23–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RM07–16–000; RM01–5–000; and RM12–3–000]

Effective Date of Revised Company Registration Requirements

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice.

SUMMARY: This document establishes the effective date of the Revised Company Registration Requirements. The Commission issued a Notice in the **Federal Register**, 78 FR 10,614 (February 14, 2013), requesting public comments by April 15, 2013.

DATES: Effective on August 5, 2013.

FOR FURTHER INFORMATION CONTACT: *For legal issues:* Nicholas Gladd, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8836, *Nicholas.Gladd@ferc.gov.*

For technical issues: Anthony Barracchini, Office of the Executive Director, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, 202–502–8940, *anthony.barracchini@ferc.gov.*

SUPPLEMENTARY INFORMATION:

Notice of Effective Date of Revised Company Registration Requirements

Take notice that beginning on August 5, 2013, the Commission will implement the new company registration format for those filings requiring the use of a Company Identifier (CID) number. The company registration system currently applies only to electronic tariff (eTariff) and Electric Quarterly Report (EQR) filings and does not apply to, or change the procedures relating to, other filings made through the Commission's eFiling system.

After August 5, filings requiring the use of a CID number cannot be made until the filer either has registered using the new format or transitioned its existing company registration to the new format. Companies required to file using CIDs are urged to register or complete the transition process prior to making a filing to avoid the potential for registration problems on the day of the filing.

As explained in the Commission's February 7, 2013 order,[1] the new system adopts a revised method of authenticating filings requiring the use of a CID number that improves the filer's security by eliminating the practical need under the current CID system for a filing company to share its company registration password.[2] Under the new system, the filer will maintain a list of eRegistered account administrators and agents whom it has authorized to submit filings on its behalf. Account administrators, in addition to making filings themselves, will have additional rights to administer the company registration account settings and designate agents to make filings. To make a filing, an account administrator or agent will use its individual eRegistration account to log onto FERC Online and choose the type of filing (e.g., eTariff), and then will be presented with a list of all the filing companies for which they are registered to make that type of filing.

A detailed instruction manual for the new company registration system is posted at *http://www.ferc.gov/docs-filing/revised-company-registration-instruct.pdf.*

For more information, please contact:

For legal issues: Nicholas Gladd, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8836, *Nicholas.Gladd@ferc.gov.*

For technical issues: Anthony Barracchini, Office of the Executive Director, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, 202–502–8940, *anthony.barracchini@ferc.gov.*

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[1] *Revisions to Company Registration and Establishing Technical Conference,* 142 FERC ¶ 61,097 (2013).

[2] A company with an existing CID will use its password to effectuate the transition to the new process. After the transition, the password will not be needed.

Dated: July 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–17727 Filed 7–23–13; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2013–0403; FRL–9388–3]

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA), this document announces that EPA is planning to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB). The ICR, entitled: ''EPA's Design for the Environment (DfE) Logo Redesign Consultations'' and identified by EPA ICR No. 2487.01 and OMB Control No. 2070-new, represents a new request. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection that is summarized in this document. The ICR and accompanying material are available in the docket for public review and comment.

DATES: Comments must be received on or before September 23, 2013.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2013–0403, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave. NW., Washington, DC. ATTN: Docket ID Number EPA–HQ–OPPT–2013–0403. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2013–0403. EPA's policy is that all comments received will be included in the docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or email. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* David DiFiore, Pollution Prevention Division (7406–M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–8796; fax number: (202) 564–8892; email address: *DiFiore.David@epa.gov*.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave. Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. What information is EPA particularly interested in?

Pursuant to PRA section 3506(c)(2)(A) (44 U.S.C. 3506(c)(2)(A)), EPA specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility.
2. Evaluate the accuracy of the Agency's estimates 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.
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

II. What information collection activity or ICR does this action apply to?

Title: EPA's Design for the Environment (DfE) Logo Redesign Consultations.

ICR number: EPA ICR No. 2487.01.

OMB control number: OMB Control No. 2070-new.

ICR status: This ICR is for a new information collection activity. 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 OMB control numbers for EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: This information collection supports the consultation process by which the U.S. Environmental Protection Agency (EPA) will select a revised logo and messaging for its Design for the Environment (DfE) program. A key goal of the Agency's DfE program is to work with businesses to voluntarily incorporate safer chemicals and other health and environmental considerations into the design of their products and processes. To achieve this goal, DfE relies on outreach activities and information dissemination to industry participants and the public, as well as non-governmental organizations, EPA Regions, federal government laboratories, and state and local governments. Effective outreach and communications are vital to program success. The DfE program must ensure that its logo communicates clearly its safer chemistry and pollution prevention goals.

DfE's current logo has remained unchanged since the program began in 1992. The current DfE logo is dated and does not adequately convey and enable DfE's objective: To advance chemical-based products that are safer for people and the environment. A redesigned logo and messaging are needed to enhance communications and for the program to reach its potential. It is important for the redesign effort to be informed by consumers, manufacturing partners, retailers, and other key audiences.

To help ensure broad public participation in the redesign process and that EPA receives input from a diverse demographic, the Agency will conduct a number of focus group sessions to obtain feedback on several logo design concepts and associated wording. DfE will also sponsor two surveys, as discussed in Part B of the Supporting Statement, to gauge public awareness and understanding of the logo and its meaning before and after the redesign.

Responses to the collection of information are voluntary. Respondents may claim all or part of a notice confidential. EPA will disclose information that is covered by a claim of confidentiality only to the extent permitted by, and in accordance with, the procedures in TSCA section 14 and 40 CFR part 2.

Burden statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to range between 0.17 and 2 hours per response depending upon the type of respondent. Burden is defined in 5 CFR 1320.3(b).

The ICR, which is available in the docket along with other related materials, provides a detailed explanation of the collection activities and the burden estimate that is only briefly summarized here:

Respondents/Affected Entities: Entities potentially affected by this ICR are individual adult consumers who are members of the general population.

Estimated total number of potential respondents: 198.

Frequency of response: On occasion.

Estimated total average number of responses for each respondent: 1.

Estimated total annual burden hours: 66 hours.

Estimated total annual costs: $ 2,035. This includes an estimated burden cost of $0 and an estimated cost of $0 for capital investment or maintenance and operational costs.

III. Are there changes in the estimates from the last approval?

Because this is a new ICR, change in burden is not applicable.

IV. What is the next step in the process for this ICR?

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 pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** document pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

List of Subjects

Environmental protection, Reporting and recordkeeping requirements.

Dated: July 17, 2013.

James Jones,

Acting Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2013–17832 Filed 7–23–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2013–0497; FRL–9392–6]

Ortho-Phthalaldehyde; Receipt of Application for Emergency Exemption, Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received a specific exemption request from the National Aeronautics and Space Administration (NASA) to use the pesticide ortho-phthalaldehyde (OPA) (CAS No. 643–79–8) to treat the International Space Station internal active thermal control system (IATCS) coolant including the United States (U.S.) Laboratory, the Japanese Experiment Module, the Columbus and Node with a total volume of 829 L with a maximum of 1,974 cm^3 OPA resin/year to control aerobic/microaerophilic water bacteria. The applicant proposes the use of a new chemical which has not been registered by EPA. EPA is soliciting public comment before making the decision whether or not to grant the exemption.

DATES: Comments must be received on or before August 8, 2013.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2013–0497, by one of the following methods:

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

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

FOR FURTHER INFORMATION CONTACT: Debra Rate, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 306–0309; fax number: (703) 605–0781; email address: *rate.debra@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to 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 EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide(s) discussed in this document, compared to the general population.

II. What action is the agency taking?

Under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), at the discretion of the EPA Administrator, a Federal or State agency may be exempted from any provision of FIFRA if the EPA Administrator determines that emergency conditions exist which require the exemption. NASA has requested the EPA Administrator to issue a specific exemption for the use of OPA in the International Space Station IATCS coolant to control aerobic/microaerophilic water bacteria. Information in accordance with 40 CFR part 166 was submitted as part of this request.

As part of this request, the applicant asserts that OPA is the most effective biocide which meets the requisite criteria, including: the need for safe, non-intrusive implementation and operation in a functioning system; the ability to control existing planktonic and biofilm residing micro-organisms; a negligible impact on system-wetted materials of construction; and a negligible reactivity with existing coolant additives. Non-use of OPA in the requested manner would leave NASA's International Space Station without an adequate long-term solution for controlling the micro-organisms in the coolant systems.

The Applicant proposes to make no more than 1 application of OPA/loop in the International Space Station IATCS coolant including the U.S. Laboratory, the Japanese Experiment Module, the Columbus and Node with a total volume not to exceed 829 L with a maximum of 1,974 cm^3 OPA resin.

This notice does not constitute a decision by EPA on the application itself. The regulations governing FIFRA section 18 require publication of a notice of receipt of an application for a specific exemption proposing use of a new chemical (i.e., an active ingredient) which has not been registered by EPA. The notice provides an opportunity for public comment on the application.

The Agency, will review and consider all comments received during the comment period in determining whether to issue the specific exemption requested by the NASA.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: July 9, 2013.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2013–17419 Filed 7–23–13; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice 2013–0038]

Application for Final Commitment for a Long-Term Loan or Financial Guarantee in Excess of $100 Million: AP088035XX

AGENCY: Export-Import Bank of the United States.

ACTION: Notice.

SUMMARY: This Notice is to inform the public, in accordance with Section 3(c)(10) of the Charter of the Export-Import Bank of the United States (''Ex-Im Bank''), that Ex-Im Bank has received an application for final commitment for a long-term loan or financial guarantee in excess of $100 million (as calculated in accordance with Section 3(c)(10) of the Charter). Comments received within the comment period specified below will be presented to the Ex-Im Bank Board of Directors prior to final action on this transaction.

Reference: AP088035XX.

Purpose and Use: Brief description of the purpose of the transaction:

To support the export of U.S.-manufactured commercial aircraft to Norway.

Brief non-proprietary description of the anticipated use of the items being exported:

To be used for medium-haul and long-haul air service between Norway/Sweden and destinations in Asia, United States and other countries.

To the extent that Ex-Im Bank is reasonably aware, the item(s) being exported may be used to produce exports or provide services in competition with the exportation of goods or provision of services by a United States industry.

Parties: Principal Supplier: The Boeing Company.

Obligor: Norwegian Air Shuttle ASA.

Guarantor(s): N/A.

Description of Items Being Exported: The items being exported are Boeing 787 aircraft.

Information on Decision: Information on the final decision for this transaction will be available in the ''Summary Minutes of Meetings of Board of Directors'' on *http://exim.gov/newsandevents/boardmeetings/board/.*

Confidential Information: Please note that this notice does not include confidential or proprietary business information; information which, if disclosed, would violate the Trade Secrets Act; or information which would jeopardize jobs in the United States by supplying information that competitors could use to compete with companies in the United States.

DATES: Comments must be received on or before August 19, 2013 to be assured of consideration before final consideration of the transaction by the Board of Directors of Ex-Im Bank.

ADDRESSES: Comments may be submitted through Regulations.gov at *WWW.REGULATIONS.GOV.* To submit a comment, enter EIB–2013–0038 under the heading ''Enter Keyword or ID'' and select Search. Follow the instructions provided at the Submit a Comment screen. Please include your name, company name (if any) and EIB–2013–0038 on any attached document.

Cristopolis A. Dieguez,

Program Specialist, Office of the General Counsel.

[FR Doc. 2013–17758 Filed 7–23–13; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL LABOR RELATIONS AUTHORITY

Senior Executive Service (SES) Performance Review Board

AGENCY: Federal Labor Relations Authority.

ACTION: Notice.

SUMMARY: The Federal Labor Relations Authority (FLRA) publishes the names of the persons selected to serve on its SES Performance Review Board (PRB). This notice supersedes all previous notices of the PRB membership.

DATES: Upon publication.

FOR FURTHER INFORMATION CONTACT: Sarah Whittle Spooner, Executive Director, Federal Labor Relations Authority; 1400 K Street NW., Washington, DC 20424–0001; (202) 218–7791.

SUPPLEMENTARY INFORMATION: Section 4314(c) of Title 5, U.S.C. requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more PRBs. The PRB shall review and evaluate the initial appraisal of a senior executive's performance by the supervisor, along with any response by the senior executive, and make recommendations to the final rating authority relative to the performance of the senior executive.

The persons named below have been selected to serve on the FLRA's PRB.

Susan D. McCluskey, Chief Counsel; H. Joseph Schimansky, Executive Director, Federal Service Impasses Panel; James E. Petrucci, Director, Dallas Regional Office; Peter A. Sutton, Acting Deputy General Counsel; Sarah Whittle Spooner, Executive Director.

Dated: July 19, 2013.

Sarah Whittle Spooner,

Executive Director.

[FR Doc. 2013–17785 Filed 7–23–13; 8:45 am]

BILLING CODE 6727–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments on the agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. A Copy of the agreement is available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012213.

Title: Simatech/ELJSA Slot Purchase Agreement.

Parties: Simatech Americas S.A. and Evergreen Line Joint Service Agreement.

Filing Party: Paul M. Keane, Esq.; Cichanowicz, Callan, Keane, Vengrow & Textor, LLP; 61 Broadway, Suite 3000, New York, NY 10006–2802.

Synopsis: The agreement authorizes Evergreen Line Joint Service Agreement to purchase space on Simatech's service between Miami, Florida, and ports in Honduras and Guatemala.

By Order of the Federal Maritime Commission.

Dated: July 19, 2013.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2013–17803 Filed 7–23–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[60Day–13–13G]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Agency for Toxic Substances and Disease Registry (ATSDR) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 or send comments to LeRoy Richardson, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Chemical Emergencies Audience Analysis—New—Agency for Toxic Substances and Disease Registry (ATSDR).

Background and Brief Description

The National Center for Environmental Health (NCEH) and the Agency for Toxic Substances and Disease Registry (ATSDR) play a vital role in mitigating chemical-related risks to public health. As part of that role, both agencies are responsible for assessing, minimizing, and monitoring risks to public health, and are tasked with providing trusted, accurate health information to the public. Given that both agencies are under the same leadership, information collected to inform health communications will be of value to both agencies.

The Office of Communications is seeking a one-year Office of Management and Budget (OMB)-approval for an initiative to increase the effectiveness of the agencies' communications related to both unintentional and intentional chemical releases. In order to inform the development of messages and materials, the Office of Communications would like to understand the knowledge, attitudes, and behaviors (KAB) of key professional audiences who are involved in the immediate aftermath of chemical emergencies. In consultation with Subject Matter Experts, the Office of Communications prioritized the following professional audiences for this research:

- First responders, including police, fire fighters and emergency medical service workers
- Emergency department personnel, both clinical and non-clinical
- Environmental and public health professionals at the city, county and state levels
- Poison Control Center directors and staff

This information collection seeks to characterize what these key professionals know and believe about chemical emergency events, what related activities and behaviors they engage in or would engage in, what information these audiences want, and what their challenges and concerns are.

This information collection seeks approval to obtain data using two qualitative data collection methods. The first method includes focus groups to explore the KAB of members of these key professions in a group setting, allowing for dialogue between participants to provide the Office of Communications with in-depth information about this complex topic. Focus groups will take place remotely using Webinar technology, and participants will join the discussion by telephone. Although the Recruitment Screeners vary by respondent type, the same Moderator's Guide will be used for all focus groups. The second part of this information collection will include individual interviews with state-level environmental health professionals and Poison Control Center directors. Individual interviews will allow the agencies to gather in-depth information about state-level response structures and Poison Control Centers. Interviews will take place by telephone. To help ensure that participants have some experience responding to chemical emergencies, participants will be recruited from five states with the highest number of chemical emergencies, and within those states, from the areas where the highest number of incidents have occurred.

There are no costs to respondents other than their time. The total burden hours requested is 138 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hrs.)	Total burden (in hrs.)
First responders	Focus Group Recruitment Screener	72	1	5/60	6
	Focus Group Moderator Guide	36	1	1	36
Emergency department personnel	Focus Group Recruitment Screener	72	1	5/60	6
	Focus Group Moderator Guide	36	1	1	36
County or city environmental health professionals.	Focus Group Recruitment Screener	36	1	5/60	3
	Focus Group Moderator Guide	18	1	1	18
Poison Control Center staff	Focus Group Recruitment Screener	36	1	5/60	3
	Focus Group Moderator Guide	18	1	1	18
State environmental health professionals.	Interview Recruitment Screener	7	1	5/60	1
	Interview Guide	5	1	1	5
Poison Control Center directors	Interview Recruitment Screener	7	1	5/60	1
	Interview Guide	5	1	1	5
Total					138

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–17738 Filed 7–23–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–13–13[H]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 or send comments to Leroy Richardson, 1600 Clifton Road, MS D–74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

CDC Work@Health Program: Phase 2 Training and Technical Assistance Evaluation—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

In the United States, chronic diseases such as heart disease, obesity and diabetes are among the leading causes of death and disability. Although chronic diseases are among the most common and costly health problems, they are also among the most preventable. Adopting healthy behaviors—such as eating nutritious foods, being physically active and avoiding tobacco use—can prevent the devastating effects and reduce the rates of these diseases.

Employers are recognizing the role they can play in creating healthy work environments and providing employees with opportunities to make healthy lifestyle choices. To support these efforts, the Centers for Disease Control and Prevention (CDC) plans to offer a comprehensive workplace health program called Work@Health. The Work@Health Program is authorized by the Public Health Service Act and funded through the Prevention and Public Health Fund of the Patient Protection and Affordable Care Act (ACA). The Work@Health curriculum will be based on a problem-solving approach to improving employer knowledge and skills related to effective, science-based workplace health programs, and supporting the adoption of these programs in the workplace. Topics to be covered in the Work@Health curriculum include principles, strategies, and tools for leadership engagement; how to make a business case for workplace health programs; how to assess the needs of organizations and individual employees; how to plan, implement, and evaluate sustainable workplace health programs; and how to partner with community organizations for additional support.

The Work@Health Program will be implemented in two phases. In Phase 1, CDC will conduct an employer needs assessment, develop training models, and conduct pilot training and evaluation with approximately 60 employers and other organizations. In Phase 2, CDC will transition to full-scale program implementation and evaluation involving approximately 540 employers, as well as approximately 60 individuals with training and experience in workplace health who are interested in becoming trained/certified instructors for the Work@Health Program.

CDC will offer training in four models (formats): (1) A ''Hands-on'' instructor-led workshop model (T1); (2) a self-paced ''Online'' model (T2); (3) a combination or ''Blended'' model (T3); and (4) a ''Train-the-Trainer'' model (T4) designed to prepare qualified individuals to train other employers using the Work@Health curricula. Employers who complete the T1–T3 training will be invited to participate in peer learning networks and receive technical assistance from coaches to support their efforts to implement or enhance their workplace health programs. Technical assistance will also be provided to the individuals who complete the T4 model to help prepare them to provide the Work@Health training to employers.

To be eligible for the T1–T3 trainings, employers must have a minimum of 30 employees, a valid business license, and have been in business for at least one year. In addition, they must offer health insurance to their employees and have at least minimal workplace health program knowledge and experience. Applicants for the T4 training model must have previous knowledge, training and experience with workplace health programs and an interest in becoming instructors for the Work@Health program. They may be referred by employers, health departments, business coalitions, trade associations, or other organizations.

CDC is requesting OMB approval to initiate Phase 2 information collection in December 2013. CDC plans to collect information needed to select the employers who will participate in the T1–T3 trainings and the individuals who will participate in the T4 Train-the-Trainer model; to describe the implementation of the Work@Health program; to obtain reactions to the training and technical assistance from trainees, instructors, and coaches; to assess changes in trainees' knowledge, awareness, behavior and skill level before and after participation in Work@Health; and to evaluate the impact of Work@Health on the adoption of workplace health programs, policies and environmental supports among participating employers. In addition, for one year after the implementation period, CDC will continue to collect information to assess the sustainability of organizational level changes in workplace health programs and policies.

OMB approval is requested for two years for Phase 2 information collection. Information will be used to evaluate the effectiveness of the Work@Health program and to identify the best way(s) to deliver skill-based workplace health training and technical support to employers.

Participation in Work@Health is voluntary and there are no costs to participants other than their time and cost of travel.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Interested Employer	Employer Application Form	600	1	20/60	200
Employers Participating in the Work@Health Program.	CDC Worksite Health Scorecard	540	1	30/60	270
	Organizational Assessment	540	1	15/60	135
	Employer Follow-up Survey	270	1	30/60	135
	Case Study Interviews with Senior Leadership.	3	1	1	3
	Case Study Interviews with Employees.	6	1	1	6
Trainees Participating in the Work@Health Program.	Trainee KAB Survey	1,080	1	20/60	360
	Trainee Reaction Survey—Hands-On Model.	180	1	15/60	45

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
	Trainee Reaction Survey—Online Model.	180	1	15/60	45
	Trainee Reaction Survey—Blended Model.	180	1	15/60	45
	Trainee Technical Assistance Survey.	1,080	1	15/60	270
	Case Study Interviews with Selected Trainees.	15	1	1	15
	Focus Group with Trainees	11	1	1.5	17
Trainees Participating in the Train-the-Trainer Model.	Train-the-Trainer Application	60	1	30/60	30
	Trainee Facilitation Survey	60	1	20/60	20
	Trainee Reaction Survey	30	1	15/60	8
	Train-the-Trainer Trainee Technical Assistance Survey.	60	1	15/60	15
Trainees Participating in the Work@Health Program Wave 2.	Wave 2 Trainee Reaction Survey	150	1	15/60	38
Instructors/Coaches	Group Discussions with Instructors/Coaches.	11	1	30/60	6
Total					1,663

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–17739 Filed 7–23–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–13–13SL]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

CDC Work@Health Program: Phase 1 Needs Assessment and Pilot Training Evaluation—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) is establishing the Work@Health Program, a comprehensive workplace health promotion training program, to support employers' efforts to create healthy work environments and provide employees with opportunities to make healthy lifestyle choices. The Work@Health curriculum will be based on a problem-solving approach to improving employer knowledge and skills related to effective, science-based workplace health programs, and supporting the adoption of these programs in the workplace.

The Work@Health Program will train and support small, mid-size, and large employers with three primary goals: (1) Increase understanding of the training needs of employers and the best way to deliver skill-based training to them; (2) Increase employers' level of knowledge and awareness of workplace health program concepts and principles as well as tools and resources to support the design, implementation, and evaluation of effective workplace health strategies and interventions; and (3) Increase the number of science-based workplace health programs, policies, and practices in place at participating employers' worksites and increase the access and opportunities for employees to participate in them.

The Work@Health Program will be implemented in two phases. In Phase 1, CDC will conduct an employer needs assessment, develop training models, and conduct pilot training and evaluation with approximately 60 employers and other organizations. In Phase 2, CDC will transition to full-scale program implementation and evaluation involving approximately 600 employers and other organizations. CDC is requesting OMB approval to initiate Phase 1 information collection in summer 2013.

A one-time Training Needs Assessment Survey will be administered electronically to 200 employers representing small, mid-size, and large businesses from various industry sectors and geographic locales. The needs assessment survey will allow CDC to assess employer preferences with respect to curriculum content, the types of support materials needed by employers and the appropriate level of detail for these materials, and the best approaches for providing technical assistance to employers.

CDC plans to pilot the training with 60 employers in four models (formats), with 15 employers participating in each: (1) A ''Hands-on'' instructor-led workshop model (T1), (2) a self-paced ''Online'' model (T2), (3) a combination or ''Blended'' model (T3), and (4) a ''Train-the-Trainer'' model (T4) designed to prepare qualified individuals to train employers through the Hands-on, Online, or Blended models. Upon completion of the pilot training, each participant will be asked to complete a 15–20 minute evaluation survey to allow CDC to assess respondent satisfaction with the procedures, methods, content and strategies employed in each Work@Health training model.

Participation in the Work@Health Program needs assessment and pilot training evaluation surveys is voluntary for employers. There are no costs to participants other than their time.

CDC will use the information collected in the needs assessment survey to inform the development of the Work@Health training curriculum and delivery methods. The information collected in the pilot training surveys will be used to assess respondent satisfaction with and suggestions for the procedures, methods, content and strategies employed in each Work@Health training model.

OMB approval is requested for one year. The total estimated annualized burden hours are 117.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hr)
Employers	Training Needs Assessment Survey	200	1	20/60
Employers Participating in the Work@Health Pilot Training Program.	Pilot Employer Application Form	400	1	5/60
	Pilot Training: Hands-on Model Evaluation Survey.	15	1	15/60
	Pilot Training: Online Model Evaluation Survey.	15	1	15/60
	Pilot Training: Blended Model Evaluation Survey.	15	1	20/60
	Pilot Training: Train-the-Trainer Model Evaluation Survey.	15	1	15/60

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–17798 Filed 7–23–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–13–13[I]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 and send comments to LeRoy Richardson, at CDC 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) 2 ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

ROPS Attributes Identified by Distribution Channel Intermediaries—New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The mission of the National Institute for Occupational Safety and Health (NIOSH) is to promote safety and health at work for all people through research and prevention. The prevention of traumatic injury is within the purview of NIOSH, and elevated incidence and rates of traumatic injury are found in the farming community. High rates of traumatic injury are associated with the use of older tractors that are not equipped with rollover protective structures (ROPS), which have been proven to reduce tractor-rollovers, a leading cause of injury to agricultural workers. To reduce the incidence of traumatic injury among farm workers, NIOSH proposes to administer stated-preference questionnaires designed to assess preference among a group of tractor-parts dealers in Pennsylvania, New York, New Hampshire and Vermont, who have membership in the Northeast Equipment Dealers' Association (NEDA). NEDA is a trade group for tractor parts dealers and is active in 12 States in the Northeast and Mid-Atlantic States. This information will be used to assess the impediments and barriers to adoption, as well as the incentives, for the distribution and sale of ROPS.

ROPS are generally provided to end users by tractor parts dealers, who constitute distribution channel intermediaries between the manufacturer and the consumer. However, little is known about the decision processes that tractor parts dealers follow in deciding whether or not to provide ROPS to end users. The current project will generate ranking scores for the importance given to various items of concern to tractor parts dealers; these most-important items were previously developed through review of relevant research studies.

CDC proposes to collect customized information, from 520 NEDA establishments, over a one-month period. This information will be of three kinds: 1. General screening information as to the appropriateness of administering a survey to the respondent organization; 2. Limited respondent perception of the demographic characteristics on the client base served by the NEDA establishment, and 3. Importance ranking of attributes of the process of providing ROPS, or the ROPS configuration itself.

This information will allow CDC to compile a systematic, quantifiable inventory of preference data for a group that is considered representative of tractor parts dealers nationwide. It will also allow CDC to develop recommendations for overcoming the barriers that have compromised the effectiveness of occupational health and safety programs.

The total estimated burden for the one-time retrospective data collection is 39 hours which is based on a reduced response rate of 90% (468 respondents), as indicated in the table below. The average burden per response is 5 minutes. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hrs)	Total burden (in hrs)
Tractor Parts Dealers	ROPS Questionnaire for Tractor Parts Dealers.	468	1	5/60	39
Total					39

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–17740 Filed 7–23–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–13–13PV]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Study to Explore Educational Children's Book in Pediatric Offices—NEW—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Using a children's picture book format, CDC developed *Amazing Me: It's Busy Being 3!* to increase awareness of developmental milestones among parents of 3-year-old children and actively engage them in the monitoring of their child's development. CDC partnered with Lysol and Reach Out and Read (ROR), a non-profit organization that promotes early literacy among low-income families by distributing books in pediatric exam rooms, to disseminate copies of *Amazing Me* to parents. In Spring 2012, 250 of RoR's largest pediatric clinics each received 300 copies of *Amazing Me* for distribution to parents of 3-year-old children during well-child visits. Distribution of *Amazing Me* through RoR practices was used as a vehicle to reach those at higher risk for developmental delays and disabilities: Children insured by Medicaid and children from families with low incomes.

Preliminary data gathered from a web survey of RoR clinic staff indicates that clinic staff are not only receptive to but supportive of the *Amazing Me* book. However, the web survey of RoR clinic staff does not provide information from the book's target audience: Parents. If CDC wishes to expand book distribution beyond ROR clinic settings, it will be important to gather data on parents' experiences receiving the *Amazing Me* book as part of a pediatric visit, and what kind of influence, if any, the book has had on their knowledge, attitudes, and beliefs about developmental milestones.

To this end, CDC will identify and recruit three ROR pediatric practices and three non-ROR practices in the greater Atlanta, Georgia and greater Washington, DC areas to distribute copies of *Amazing Me* to parents/guardians of 3 year olds, soon to be 3 year olds, or recently turned 4 year olds attending the selected practices. The study will gather feedback from parents/guardians about (1) their experiences receiving the book as part of a pediatric visit, and (2) the influence of the book on their awareness, attitudes, and self-efficacy regarding monitoring developmental milestones. Findings from the parent web survey and focus groups will help CDC to determine if a children's book is an effective channel for reaching parents, whether more books like *Amazing Me* for other age groups should be developed, and if the ROR book distribution model is an effective means to reach low-income and at-risk families.

Data will be gathered through a web survey of 900 parents/guardians who have received a copy of the *Amazing Me* book from participating ROR and non-ROR practices. Parents/guardians will access the web survey by logging onto a URL address provided on a sticker affixed to the inside cover of each *Amazing Me* book. All survey responses (100%) will be submitted through a secure survey Web site established for this project.

CDC will also conduct six follow-up focus groups with survey respondents to gather more in-depth information from parents about their experiences reading the Amazing Me book at home with their children and assessing their child's development using the book. We estimate that we will screen 60 parents/guardians to recruit 54 participants for the focus groups. These six focus groups will be conducted in greater Atlanta, Georgia (2) and greater Washington, DC (4).

This request is submitted to obtain OMB clearance for one year. The estimated annualized burden is 229 hours. There are no costs to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Parents/Guardians	Web Survey	900	1	10/60
Parents/Guardians	Follow-up web survey	900	1	1/60
Parents/Guardians	Focus Group Screener	60	1	5/60
Parents/Guardians	Focus Group Informed Consent	54	1	5/60
Parents/Guardians	Focus Group Moderator	54	1	1

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–17799 Filed 7–23–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10268, CMS–10287, CMS–R–70, CMS–R–72, CMS–R–247, CMS–10151, CMS–10380, CMS–10286, and CMS–10339]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by August 23, 2013.

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions: OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–6974, or Email: *OIRA_submission@omb.eop.gov*.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*.
2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*.
3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (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. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Reinstatement of a currently approved collection; *Title of Information Collection:* Consolidated Renal Operations in a Web Enabled Network (CROWNWeb) Third-party Submission Authorization Form; *Use:* The Consolidated Renal Operations in a Web Enabled Network (CROWNWeb) Third-Party Submission Authorization form (CWTPSA) is to be completed by ''Facility Administrators'' (administrators of CMS-certified dialysis facilities) if they intend to authorize a third party (a business with which the facility is associated, or an independent vendor) to submit data to us to comply with the recently-revised Conditions for Coverage of dialysis facilities. The CROWNWeb system is the system used as the collection point of data necessary for entitlement of ESRD patients to Medicare benefits and for Federal Government monitoring and assessing of the quality and types of care provided to renal patients. The information collected through the CWTPSA form will allow us along with our contractors to receive data from authorized parties acting on behalf of CMS-certified dialysis facilities. Since February 2009, we have received 4,160 CWTPSA forms and anticipates that they will continue to receive no more than 400 new CWTPSA forms annually to address the creation of new facilities under the current participating ''third party submitters.'' *Form Number:* CMS–10268 (OCN: 0938–1052); *Frequency:* Occasionally; *Affected Public:* Private Sector—Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 400; *Total Annual Responses:* 400; *Total Annual Hours:* 34. (For policy questions regarding this collection contact Michelle Tucker at 410–786–0736.)

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicare Quality of Care Complaint Form; *Use:* In

accordance with Section 1154(a)(14) of the Social Security Act, Quality Improvement Organizations (QIOs) are required to conduct appropriate reviews of all written complaints submitted by beneficiaries concerning the quality of care received. The Medicare Quality of Care Complaint Form will be used by Medicare beneficiaries to submit quality of care complaints. This form will establish a standard form for all beneficiaries to utilize and ensure pertinent information is obtained by QIOs to effectively process these complaints. *Form Number:* CMS–10287 (OCN: 0938–1102); *Frequency:* Reporting—Occasionally; *Affected Public:* Individuals or Households; *Number of Respondents:* 3,500; *Total Annual Responses:* 3,500; *Total Annual Hours:* 583. (For policy questions regarding this collection contact Coles Mercier at 410–786–2112.)

3. *Type of Information Collection Request:* Reinstatement with a change of a previously approved collection; *Title of Information Collection:* Information Collection Requirements in HSQ–110, Acquisition, Protection and Disclosure of Peer review Organization Information and Supporting Regulations in 42 CFR, Sections 480.104, 480.105, 480.116, and 480.134; *Use:* The Peer Review Improvement Act of 1982 authorizes quality improvement organizations (QIOs), formally known as peer review organizations (PROs), to acquire information necessary to fulfill their duties and functions and places limits on disclosure of the information. The QIOs are required to provide notices to the affected parties when disclosing information about them. These requirements serve to protect the rights of the affected parties. The information provided in these notices is used by the patients, practitioners and providers to: obtain access to the data maintained and collected on them by the QIOs; add additional data or make changes to existing QIO data; and reflect in the QIO's record the reasons for the QIO's disagreeing with an individual's or provider's request for amendment.: *Form Number:* CMS–R–70 (OCN: 0938–0426); *Frequency:* Reporting—On occasion; *Affected Public:* Business or other for-profits; *Number of Respondents:* 400; *Total Annual Responses:* 21,200; *Total Annual Hours:* 42,400. (For policy questions regarding this collection contact Coles Mercier at 410–786–2112.)

4. *Type of Information Collection Request:* Reinstatement without change of a previously approved collection; *Title of Information Collection:* Information Collection Requirements in 42 CFR 478.18, 478.34, 478.36, 478.42, QIO Reconsiderations and Appeals; *Use:* In the event that a beneficiary, provider, physician, or other practitioner does not agree with the initial determination of a Quality Improvement Organization (QIO) or a QIO subcontractor, it is within that party's rights to request reconsideration. The information collection requirements 42 CFR 478.18, 478.34, 478.36, and 478.42, contain procedures for QIOs to use in reconsideration of initial determinations. The information requirements contained in these regulations are on QIOs to provide information to parties requesting the reconsideration. These parties will use the information as guidelines for appeal rights in instances where issues are actively being disputed. *Form Number:* CMS–R–72 (OCN: 0938–0443); *Frequency:* Reporting—On occasion; *Affected Public:* Individuals or Households and Business or other for-profit institutions; *Number of Respondents:* 2,590; *Total Annual Responses:* 5,228; *Total Annual Hours:* 2,822. (For policy questions regarding this collection contact Coles Mercier at 410–786–2112.)

5. *Type of Information Collection Request:* Reinstatement with a change of a previously approved collection; *Title of Information Collection:* Expanded Coverage for Diabetes Outpatient Self-Management Training Services and Supporting Regulations Contained in 42 CFR 410.141, 410.142, 410.143, 410.144, 410.145, 410.146, 414.63; *Use:* According to the National Health and Nutrition Examination Survey (NHANES), as many as 18.7 percent of Americans over age 65 are at risk for developing diabetes. The goals in the management of diabetes are to achieve normal metabolic control and reduce the risk of micro- and macro-vascular complications. Numerous epidemiologic and interventional studies point to the necessity of maintaining good glycemic control to reduce the risk of the complications of diabetes. Despite this knowledge, diabetes remains the leading cause of blindness, lower extremity amputations and kidney disease requiring dialysis. Diabetes and its complications are primary or secondary factors in an estimated 9 percent of hospitalizations (Aubert, RE, et al., Diabetes-related hospitalizations and hospital utilization. In: Diabetes in America. 2nd ed. National Institutes of Health, National Institute of Diabetes and Digestive and Kidney Disease, NIH, Pub. No 95–1468–1995: 553–570). Overall, beneficiaries with diabetes are hospitalized 1.5 times more often than beneficiaries without diabetes. HCFA–3002–F provided for uniform coverage of diabetes outpatient self-management training services. These services include educational and training services furnished to a beneficiary with diabetes by an entity approved to furnish the services. The physician or qualified non-physician practitioner treating the beneficiary's diabetes would certify that these services are needed as part of a comprehensive plan of care. This rule established the quality standards that an entity would be required to meet in order to participate in furnishing diabetes outpatient self-management training services. It set forth payment amounts that have been established in consultation with appropriate diabetes organizations. It implements section 4105 of the Balanced Budget Act of 1997. *Form Number:* CMS–R–247 (OCN: 0938–0818); *Frequency:* Recordkeeping and Reporting—Occasionally; *Affected Public:* Business or other for-profit institutions; *Number of Respondents:* 5327; *Total Annual Responses:* 63,924; *Total Annual Hours:* 197,542. (For policy questions regarding this collection contact Kristin Shifflett at 410–786–4133.)

6. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* Data Collection for Medicare Beneficiaries Receiving Implantable Cardioverter-Defibrillators for Primary Prevention of Sudden Cardiac Death; *Use:* We provide coverage for implantable cardioverter-defibrillators (ICDs) for secondary prevention of sudden cardiac death based on extensive evidence showing that use of ICDs among patients with a certain set of physiologic conditions are effective. Accordingly, we consider coverage for ICDs reasonable and necessary under Section 1862 (a) (1) (A) of the Social Security Act. However, evidence for use of ICDs for primary prevention of sudden cardiac death is less compelling for certain patients.

To encourage responsible and appropriate use of ICDs, we issued a ''Decision Memo for Implantable Defibrillators'' on January 27, 2005, indicating that ICDs will be covered for primary prevention of sudden cardiac death if the beneficiary is enrolled in either an FDA-approved category B IDE clinical trial (42 CFR 405.201), a trial under the CMS Clinical Trial Policy (NCD Manual § 310.1) or a qualifying prospective data collection system (either a practical clinical trial or prospective systematic data collection, which is sometimes referred to as a registry). *Form Number:* CMS–10151 (OMB#: 0938–0967); *Frequency:* Occasionally; *Affected Public:* Private

Sector; Business or other for-profits, Not-for-profit institutions; *Number of Respondents:* 1,702; *Total Annual Responses:* 82; *Total Annual Hours:* 139,356. (For policy questions regarding this collection contact JoAnna Baldwin at 410–786–7205.)

7. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Reporting Requirements for Grants to Support States in Health Insurance Rate Review and Pricing Transparency—Cycles I, II, and III; *Use:* Under the Section 1003 of the Affordable Care Act (ACA) (Section 2794 of the Public Health Service Act), the Secretary, in conjunction with the states and territories, is required to establish a process for the annual review, beginning with the 2010 plan year, of unreasonable increases in premiums for health insurance coverage. Section 2794(c) requires the Secretary to establish the Rate Review Grant Program to States to assist states to implement this provision. In addition, Section 2794(c) requires the Rate Review Grant Program to assist states in the establishment and enhancement of ''Data Centers'' that collect, analyze, and disseminate health care pricing data to the public.

The U.S. Department of Health and Human Services (HHS) released the Rate Review Grants Cycle I funding opportunity twice—first to states (and the District of Columbia) in June 2010 and then to the territories and the five states that did not apply during the first release, (*http://www.hhs.gov/ociio/initiative/final_premium_review_grant_solicitation.pdf*). The second release was due to the decision that the territories were subject to provisions of the ACA and hence eligible for the Rate Review Grants. Forty-five (45) states, 5 U.S. territories, and the District of Columbia were awarded grants. On February 24, 2011, HHS released the Funding Opportunity Award (FOA) for Cycle II Rate Review Grants. On December 21, 2012, Cycle II of the Rate Review Grant Program was amended in order to include an additional application date. Thirty (30) states, the District of Columbia, and three territories were awarded grants in Cycle II.

On May 8, 2013, CMS published the Cycle III Funding Opportunity Announcement, ''Grants to Support States in Health Insurance Rate Review and Pricing Transparency''. On July 12, 2013, the Funding Opportunity Announcement for Cycle III of the Rate Review Grants Program was amended in order to extend the deadline for submission of Letters of Intent. Concurrent with the publication of the Funding Opportunity Announcement for Cycle III, CMS published associated grantee reporting requirements consisting of: (4) quarterly reports, (5) rate review transaction data reports (quarterly and annual), (1) annual report, and (1) final report from all grantees. This information collection is required for effective monitoring of grantees and to fulfill statutory requirements under section 2794(b)(1)(A) of the ACA that requires grantees, as a condition of receiving a grant authorized under section 2794(c) of the ACA, to report to the Secretary information about premium increases. *Form Number:* CMS–10380 (OCN: 0938–1121); *Frequency:* Annually; On Occasion; *Affected Public:* Public Sector—State and Territory Governments; *Number of Respondents:* 56; *Total Annual Responses:* 1,001; *Total Annual Hours:* 31,378; (For policy questions regarding this collection contact Sarah Norman at 301–492–4185.)

8. *Type of Information Collection Request:* Reinstatement with change of a previously approved information collection; *Title of Information Collection:* Notice of Research Exception under the Genetic Information Nondiscrimination Act; *Use:* Under the Genetic Information Nondiscrimination Act of 2008 (GINA), a plan or issuer may request (but not require) a genetic test in connection with certain research activities so long as such activities comply with specific requirements, including: (i) The research complies with 45 CFR part 46 or equivalent Federal regulations and applicable State or local law or regulations for the protection of human subjects in research; (ii) the request for the participant or beneficiary (or in the case of a minor child, the legal guardian of such beneficiary) is made in writing and clearly indicates that compliance with the request is voluntary and that non-compliance will have no effect on eligibility for benefits or premium or contribution amounts; and (iii) no genetic information collected or acquired will be used for underwriting purposes. The Secretary of Labor or the Secretary of Health and Human Services is required to be notified if a group health plan or health insurance issuer intends to claim the research exception permitted under Title I of GINA. Nonfederal governmental group health plans and issuers solely in the individual health insurance market or Medigap market will be required to file with the Centers for Medicare & Medicaid Services (CMS). The Notice of Research Exception under the Genetic Information Nondiscrimination Act is a model notice that can be completed by group health plans and health insurance issuers and filed with either the Department of Labor or CMS to comply with the notification requirement. *Form Number:* CMS–10286 (OCN: 0938–1077); *Frequency:* On Occasion; *Affected Public:* State, Local, or Tribal Governments, Private Sector; *Number of Respondents:* 2; *Total Annual Responses:* 2; *Total Annual Hours:* 1; (For policy questions regarding this collection contact Usree Bandyopadhyay at 410–786–6650.)

9. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Pre-Existing Health Insurance Plan and Supporting Regulations; *Use:* On March 23, 2010, the President signed into law H.R. 3590, the Patient Protection and Affordable Care Act (Affordable Care Act), Public Law 111–148. Section 1101 of the law establishes a ''temporary high risk health insurance pool program'' (which has been named the Pre-Existing Condition Insurance Plan, or PCIP) to provide health insurance coverage to currently uninsured individuals with pre-existing conditions. The law authorizes HHS to carry out the program directly or through contracts with states or private, non-profit entities.

We are requesting an extension of this package because this information is needed to assure that PCIP programs are established timely and effectively. This request is being made based on regulations and guidance that have been issued and contracts which have been executed by HHS with states or an entity on their behalf participating in the PCIP program. PCIP is also referred to as the temporary qualified high risk insurance pool program, as it is called in the Affordable Care Act, but we have adopted the term PCIP to better describe the program and avoid confusion with the existing state high risk pool programs. *Form Number:* CMS–10339 (OMB#: 0938–1100); *Frequency:* Reporting—On occasion; *Affected Public:* state governments; *Number of Respondents:* 51; *Total Annual Responses:* 2,652; *Total Annual Hours:* 36,924. (For policy questions regarding this collection contact William Brice at 410–786–1777.)

Dated: July 19, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–17821 Filed 7–23–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–D–0836]

Draft Guidance for Industry on Pre-Launch Activities Importation Requests; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Pre-Launch Activities Importation Requests (PLAIR).'' This draft guidance describes FDA's policy regarding requests for the importation of unapproved finished dosage form drug products by applicants preparing products for market launch based on anticipated approval of a pending new drug application (NDA) or an abbreviated new drug application (ANDA). This draft guidance also applies to biologics licensing applications (BLAs) regulated by the Center for Drug Evaluation and Research. This draft guidance further describes the procedures for making these requests and the criteria that FDA will consider in granting such requests.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by September 23, 2013. Submit either electronic or written comments concerning the proposed collection of information by September 23, 2013.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Marybet Lopez, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 4286, Silver Spring, MD 20993–0002, 301–796–3110; or Stella Notzon, Office of Regulatory Affairs, Division of Import Operations, Food and Drug Administration, 12420 Parklawn Dr., Rockville, MD 20857, 301–796–6678.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Pre-Launch Activities Importation Requests (PLAIR).'' Historically, when applicants sought to import unapproved finished dosage form drug products in preparation for market launch, FDA considered such requests, informally referred to as PLAIRs, on a case-by-case basis. FDA has decided to create a more formal program, and this guidance outlines what information should be submitted to FDA in a PLAIR, when and how a PLAIR can be submitted, and the circumstances under which the Agency intends to grant a PLAIR.

An applicant who has an NDA, ANDA, or a BLA pending that is nearing an FDA application decision can submit a PLAIR request to FDA regarding the importation of the unapproved finished dosage form drug product that is the subject of the application to prepare the product for market launch. If FDA grants the PLAIR request, when the product is then offered for import, FDA intends to detain the unapproved finished dosage form drug product. FDA will, however, regard the PLAIR request to mean that the owner or consignee has requested to recondition the drug, as specified in the PLAIR request FDA has granted. FDA will thus detain the drug for up to 6 months pending a decision on the underlying application. The Agency will release the drug product when and if FDA approves the underlying NDA or ANDA within 6 months and the conditions of the PLAIR are otherwise met.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on PLAIRs. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. The Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act (44 U.S.C. 3501–3520) (the PRA), 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) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comment on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Title: Draft Guidance for Industry on Pre-Launch Activities Importation Requests (PLAIR).

Description: The draft guidance outlines what information should be submitted to FDA in a PLAIR, when and how a PLAIR can be submitted, and the circumstances under which the Agency intends to grant a PLAIR. Section III of the draft guidance requests information collection that is subject to the PRA, including the information that should be included in a PLAIR, the information to be submitted to the Office of Regulatory Affairs (ORA)/Division of Import Operations (DIO) following FDA granting a PLAIR, and the notification to ORA/DIO after the applicant receives notice from FDA that its drug product is approved. Based on FDA's experience with informal requests by applicants to import unapproved drug products for purposes described in the draft guidance, we estimate that approximately 184 PLAIRs from approximately 50 applicants will be submitted annually, and that it will take applicants approximately 16 hours to prepare and submit each PLAIR. This burden estimate also includes the time for submitting the information described above to ORA/DIO.

FDA requests comments on this information collection:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
PLAIR	50	3.68	184	16	2,944

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

In accordance with the PRA, prior to publication of any final guidance document, FDA intends to solicit public comment and obtain OMB approval for any additional information collections recommended in this guidance that are new or that would represent material modifications to those previously approved collections of information found in FDA regulations or guidances.

III. Comments

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 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.*

IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: July 19, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–17768 Filed 7–23–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–D–0755]

Guidance for Industry on Providing Submissions in Electronic Format—Postmarket Non-Expedited Individual Case Safety Reports; Technical Questions and Answers; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance to industry entitled ''Providing Submissions in Electronic Format—Postmarket Non-Expedited ICSRs; Technical Questions and Answers.'' The guidance provides firms with information on the appropriate electronic file format to use when electronically submitting to FDA postmarket non-expedited individual case safety reports (ICSRs) on adverse drug experiences.[1] The guidance explains that firms that had previously submitted non-expedited ICSRs in an electronic format that is not supported by FDA should contact the Center for Drug Evaluation and Research (CDER) or Center for Biologics and Evaluation and Research (CBER) and resubmit their non-expedited ICSRs in a compatible electronic format.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993–0002, or Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFD–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

[1] For purposes of this guidance, *adverse drug experience* includes an adverse experience associated with use of a drug or biological product, including a therapeutic vaccine.

FOR FURTHER INFORMATION CONTACT: Jeffrey Trunzo, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 4447, Silver Spring, MD 20993–0002, 301–796–2029, email: *jeffrey.trunzo@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.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance entitled ''Providing Submissions in Electronic Format—Postmarket Non-Expedited ICSRs; Technical Questions and Answers.'' The guidance provides firms with information on the appropriate electronic file format to use when electronically submitting to FDA postmarket non-expedited ICSRs for adverse drug experiences. The guidance explains that firms that had previously submitted non-expedited ICSRs in an electronic format that is not supported by FDA should contact CDER or CBER and resubmit their non-expedited ICSRs in a compatible electronic format.

FDA regulations at §§ 314.80(c)(2) and 600.80(c)(2) (21 CFR 314.80(c)(2) and 600.80(c)(2)) require applicants to submit postmarket periodic safety reports at prescribed intervals. Each periodic safety report must contain a descriptive portion and the non-expedited ICSRs [2] for the reporting interval. The descriptive portion can be submitted as a periodic adverse drug experience report [3]; a periodic adverse experience report [4]; a periodic safety

[2] As described in §§ 314.80(c)(2)(ii)(*b*) and 600.80(c)(2)(ii)(B). Non-expedited ICSRs were previously referred to as *periodic ICSRs.*

[3] *As described in* § 314.80.

[4] A*s described in* § 600.80.

update report[5]; or a periodic benefit–risk evaluation report.[6]

Non-expedited ICSRs can be submitted on paper or electronically. When submitted electronically, the non-expedited ICSRs should be submitted in XML format. This is because FDA is currently able to process electronic submissions of non-expedited ICSRs only in XML, prepared according to International Conference on Harmonisation (ICH) standards for database-to-database transmission of information.[7] When submitted in this compatible electronic format, non-expedited ICSRs can be downloaded into the FDA Adverse Event Reporting System (FAERS) database through the Electronic Submission Gateway.

We have become aware that some firms have submitted non-expedited ICSRs to the electronic Common Technical Document (eCTD) in a portable document file (pdf) format together with the descriptive portion of the periodic safety report.

FDA does not have a systematic method to identify non-expedited ICSRs that are submitted to the eCTD in pdf format together with the descriptive portion of the periodic safety report. In addition, non-expedited ICSRs submitted to the eCTD in pdf format cannot be downloaded into the FAERS database. Lack of access to non-expedited ICSRs in FAERS hinders FDA's ability to monitor product safety and public health. Furthermore, submission in pdf format prevents public access to the non-expedited ICSRs through FAERS.[8]

FDA is issuing this guidance as level 2 guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on the submission of non-expedited ICSRs in an electronic format supported by FDA. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit either 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 comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

III. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in § 314.80 have been approved under OMB control number 0910–0230. The collections of information in § 600.80 have been approved under OMB control number 0910–0308.

IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm, http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm,* or *http://www.regulations.gov.*

Dated: July 18, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–17747 Filed 7–23–13; 8:45 am]

BILLING CODE 4160–01–P

[5] FDA allows firms with approved waivers (under 21 CFR 314.90 and 600.90) to use the ICH E2C Periodic Safety Update Report format when submitting the descriptive portion of periodic safety reports.

[6] FDA allows firms with approved waivers (under 21 CFR 314.90 and 600.90) to use the ICH E2C(R2) Periodic Benefit-Risk Evaluation Report format when submitting the descriptive portion of periodic safety reports.

[7] See FAERS Electronic Submissions at *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/AdverseDrugEffects/ucm115894.htm.*

[8] FAERS data are available to the public as quarterly data files or by written Freedom of Information request to FDA. See *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/AdverseDrugEffects/ucm082193.htm.*

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

Third Annual Food and Drug Administration Health Professional Organizations Conference

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of conference.

The Food and Drug Administration (FDA) is announcing a conference for representatives of Health Professional Organizations. Topics on the agenda include FDA Updates, an overview of FDA's Network of Experts (public/private partnerships), and a FDA Town Hall. The FDA Town Hall will feature FDA senior executives including Jeffrey Shuren, M.D., J.D., Director of the Center for Devices and Radiological Health; Douglas C. Throckmorton, M.D., Deputy Director for Regulatory Programs of the Center for Drug Evaluation and Research; and Michael R. Taylor, Deputy Commissioner for Foods and Veterinary Medicine.

Date and Time: The conference will be held on October 24, 2013, from 8 a.m. to 12 noon.

Location: The conference will be held at the White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Entrance for the public meeting participants (non-FDA employees) is through Building 1 where routine security check procedures will be performed. For parking and security information, please refer to *http://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

Contact: Brenda Rose, Office of Special Health Issues, 10903 New Hampshire Ave., Silver Spring, MD 20993, *Brenda.Rose@fda.hhs.gov,* 301–796–8460.

Registration: Register at *http://www.cvent.com/d/hcqym9/1Q.* Please include the name and title of the person attending, the name of the organization, and email address. There is no registration fee for this conference. Early registration is suggested because space is limited.

SUPPLEMENTARY INFORMATION: The aim of the conference is to further the public health mission of the FDA through training, collaboration, and structured discussion between health professional organizations and FDA staff. The Office of Health and Constituent Affairs serves as a liaison between the FDA Centers and the public on matters that involve medical product safety.

Please indicate during your registration a question of greatest interest to you for the FDA Town Hall.

If you need special accommodations due to a disability, please contact Brenda Rose at *Brenda.Rose@fda.hhs.gov* at least 7 days in advance of the conference.

Dated: July 19, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–17769 Filed 7–23–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Sickle Cell Disease Treatment Demonstration Program

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Request for Class Deviation for Non-Competitive Extension: Sickle Cell Disease Treatment Demonstration Program (U1E) Awards to Three Currently Funded Grantees.

SUMMARY: HRSA currently has nine programs that are funded through competitive grant awards under the Sickle Cell Disease Treatment Demonstration Program. Three of these awards will end on August 31, 2013, prior to the end of the other six awards. HRSA intends to implement a non-competitive extension of the project period for the three grants that will end in 2013. This will allow improved data gathering from each of the grantees in the program, which will be used in a report for Congress that is mandated by the legislation authorizing the grant. In addition, the program will benefit from cost savings realized from having the program completed in a consolidated funding cycle.

SUPPLEMENTARY INFORMATION:

Intended Recipients of the Award: The three incumbent grantees of record (listed below).

Amount of the Non-Competitive Awards: Up to $390,000 per grantee.

CFDA Number: 93.365.

Period of Supplemental Funding: 9/1/2013–8/30/2014.

Authority: Section 712(c) of the American Jobs Creation Act of 2004, Pub. L. 108–357.

Justification: The Sickle Cell Disease Treatment Demonstration Program provides grants to evaluate the use of strategies in improving sickle cell care. The extension will allow the Maternal and Child Health Bureau to fully assess the impact of the program by allowing data to be gathered on the health outcomes and impact of the Sickle Cell Disease Treatment Demonstration Program from all grantees on the same timeline and in a standard format. Currently, three grantees are scheduled to end prior to the end of the other grantees, leaving a period in which data would not be gathered from these sites. Data gathered from each of the grantees in the program will be used in a report for Congress that is mandated by the legislation authorizing the grant. In addition, the program will benefit from cost savings realized from having the program completed in a consolidated funding cycle.

FOR FURTHER INFORMATION CONTACT: Edward Donnell Ivy, M.D., M.P.H, Genetic Services Branch, Division of Services for Children with Special Health Needs, Maternal and Child Health Bureau, Health Resources and Services Administration, 5600 Fishers Lane, Room 18A–19, Rockville, MD 20857; 301.443.9775; *eivy@hrsa.gov.*

MATERNAL AND CHILD HEALTH BUREAU SELECTED PROGRAMS EXTENSIONS WITH FUNDING

Grantee/organization name	Grant No.	State	Project start date	Project end date	Revised project end date	FY 2012 Appropriation	FY 2013 Appropriation
Children's Hospital & Research Center.	U1EMC16492	CA	9/1/2009	8/31/2013	8/30/2014	$390,000	$390,000
University of Colorado at Denver.	U1EMC16490	CO	9/1/2009	8/31/2013	8/30/2014	390,000	390,000
Newark Beth Israel Medical Center.	U1EMC16491	NJ	9/1/2009	8/31/2013	8/30/2014	390,000	390,000

Dated: July 17, 2013.

Mary K. Wakefield,

Administrator.

[FR Doc. 2013–17720 Filed 7–23–13; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the meeting of the Council of Councils.

The meeting will be held via teleconference and is open to the public as indicated below. Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

A portion of the meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4), and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Council of Councils.

Open: August 15, 2013, 1:00 p.m. to 1:40 p.m.

Agenda: Establishment of Chimpanzee Research Use Panel and Discussion. Vote on Establishment of the Panel. NIH Director's Early Independence Awards.

Place: National Institutes of Health, Building 1, Room 260, 1 Center Drive, Bethesda, MD 20892.

Dial in number: 1–888–790–1964.

Participant Passcode: 9121608.

Closed: August 15, 2013, 1:45 p.m. to 2:15 p.m.

Agenda: Review of Grant Applications.

Contact Person: Robin Kawazoe, Executive Secretary, Division of Program Coordination, Planning, and Strategic Initiatives, Office of the Director, NIH, Building 1, Room 260, Bethesda, MD 20892, *kawazoer@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person. Information is also available on the Council of Council's home page at *http://dpcpsi.nih.gov/council/where* an agenda and proposals to be discussed will be posted before the meeting date.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: July 17, 2013.

Carolyn Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–17697 Filed 7–23–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Newborn Screening Transitional Research Network.

Date: August 5, 2013.

Time: 12:30 p.m. to 4:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Sathasiva B. Kandasamy, Ph.D., Scientific Review Officer, Division of Scientific Review, National Institute of Child Health and Human Development, 6100 Executive Boulevard, Rockville, MD 20892–9304, (301) 435–6680, *skandasa@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.

(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: July 18, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–17696 Filed 7–23–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, July 22, 2013, 8:00 a.m. to July 23, 2013, 5:00 p.m., National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD, 20892 which was published in the **Federal Register** on June 28, 2013, 78 FR Page 38999.

The meeting will be held on August 7–8 2013 instead of July 22–23 2013 at 8:00 a.m. and will end at 5:00 p.m. The meeting location remains the same. The meeting is closed to the public.

Dated: July 17, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–17695 Filed 7–23–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; ZHD1 DSR–Z 50 1.

Date: August 13, 2013.

Time: 11:30 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Peter Zelazowski, Ph.D., Scientific Review Officer, Division Of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6902, *peter.zelazowski@nih.gov*.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; ZHD1 DSR–H GS 1.

Date: August 15, 2013.

Time: 3:15 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Marita R. Hopmann, Ph.D., Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6911, *hopmannm@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: July 18, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–17694 Filed 7–23–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Reducing the Duration of Untreated Psychosis.

Date: August 9, 2013.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Karen Gavin-Evans, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Boulevard, Room 6153, MSC 9606, Bethesda, MD 20892, 301–451–2356, *gavinevanskm@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: July 17, 2013.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–17693 Filed 7–23–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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 Cancer Institute Board of Scientific Advisors *ad hoc* Subcommittee on HIV and AIDS Malignancy.

The meeting will be held via teleconference and is open to the public. Individuals who 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 Cancer Institute Board of Scientific Advisors *ad hoc* Subcommittee on HIV and AIDS Malignancy.

Date: August 8, 2013.

Time: 10:30 a.m. to 12:00 p.m.

Agenda: Discussion of HIV and AIDS Malignancy priorities.

Place: National Cancer Institute, NIH, Building 10, Room 10S255, 10 Center Drive, Bethesda, MD 20892–1868, Telephone Number: 866–492–1791.

Contact Person: Robert Yarchoan, MD, Director, HIV/AIDS Management Branch, NIH/NCI, Building 10, Room 10S255, 10 Center Drive, Bethesda, MD 20892–1868, 301–496–0328, *yarchoan@helix.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/bsa/bsa.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: July 18, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–17718 Filed 7–23–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

Senior Executive Service Performance Review Board

AGENCY: Office of the Secretary, DHS.

ACTION: Notice of **Federal Register**.

SUMMARY: This notice announces the appointment of the members of the Senior Executive Service Performance Review Boards for the Department of Homeland Security. The purpose of the Performance Review Board is to view and make recommendations concerning proposed performance appraisals, ratings, bonuses, pay adjustments, and other appropriate personnel actions for incumbents of Senior Executive Service, Senior Level and Senior Professional positions of the Department.

DATES: *Effective Dates:* This Notice is effective July 24, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth Haefeli, Office of the Chief Human Capital Officer, telephone (202) 357–8164.

SUPPLEMENTARY INFORMATION: Each federal agency is required to establish one or more performance review boards (PRB) to make recommendations, as necessary, in regard to the performance of senior executives within the agency. 5 U.S.C. 4314(c). This notice announces the appointment of the members of the PRB for the Department of Homeland Security (DHS). The purpose of the PRB is to review and make recommendations concerning proposed performance appraisals, ratings, bonuses, pay adjustments, and other appropriate personnel actions for incumbents of SES positions within DHS.

The Board shall consist of at least three members. In the case of an appraisal of a career appointee, more than half of the members shall consist of career appointees. Composition of the specific PRBs will be determined on an ad hoc basis from among the individuals listed below:

Alles, Randolph D.
Amparo, Alexis
Anderson, Penny
Anderson, Rose J.
Andrews, John
Armstrong, Charles R.
Armstrong, Sue
Ayala, Janice
Baer, Thomas
Baran, Kathy
Barber, Delores
Baroukh, Nader
Barrett, Lawrence
Barrows, Angela
Bartoldus, Charles
Batkin, Joshua C.
Bauhs, Kimberlyn J.
Beagles, James
Beckham, Steward D.
Beers, Rand
Benda, Francis
Bersin, Alan
Bester, Margot
Bibo, David R.
Borkowski, Mark S.
Borras, Rafael
Bourbeau, Sharie
Boyce, Carla J.
Boyce, Maria Luisa
Boyd, David
Braccio, Dominick D
Bray, Robert S.
Breor, Scott
Brinsfield, Kathryn
Brooks, Vicki
Brown, Dallas
Brown, Meddie
Brundage, William
Brzymialkiewicz, Caryl
Buckingham, Patricia A.

Butcher, Michael
Button, Christopher
Byrne, Sean J.
Caggiano, Marshall L.
Cahill, Donna L.
Callahan, Colleen B.
Cameron, Michael K.
Campagnolo, Donna
Canevari, Holly
Cantor, Jonathan
Carpenter, Dea D.
Carter, Gary
Castro, Raul
Chaleki, Thomas
Chavez, Richard
Cioppa, Thomas
Clark, Kenneth
Clever, Daniel
Cline, Richard
Coffman, Katherine M.
Cogswell, Patricia
Cohen, John
Cohn, Alan
Coleman, Corey J.
Conklin, Jeffery
Conklin, William
Connor, Edward L.
Correa, Soraya
Covell, Cynthia
Coven, Phyllis
Cowan, Robert
Cox, Adam
Cummiskey, Chris
Daitch, William
Darling, Michael
Davis, Delia P.
Davis, Robert
Dayton, Mark
de Vallance, Brian
DiFalco, Frank
Dinkins, James A.
Dorko, Jeffrey J.
Dorochoff, Ruth
Driggers, Richard
Duong, Anh
Durette, Paul
Durham, Debra
Durkovich, Caitlin
Edwards, Eric L.
Emerson, Catherine
Emrich, Matthew
Ennis, Eileen
Epstein, Gerald
Erevia, Victor
Essid, Michael
Fagerholm, Eric
Falk, Scott K.
Farley, Evan T.
Farmer, Robert A.
Fenton, Robert J.
Fisher, Michael J.
Fitzgerald, Karen
Flinn, Shawn
Flynn, William
Fonash, Peter
Fortune, Anthony
Fox, Katherine B.
Fox, Katherine M.
Frazier, Denise
Freeman, Beth A.
Fujimura, Paul N.
Gabbrielli, Tina
Gaines, Glenn A.
Gammon, Carla
Gantt, Kenneth
Garner, David
Geiselman, Sandra L.
Gerstein, Daniel
Gersten, David
Gina, Allen
Goode, Brendan
Gowadia, Huban
Grade, Deborah C.
Gramlick, Carl
Graves, Margaret
Greene, Jonathan
Griffin, Robert
Grimm, Michael
Gross-Davis, Leslie
Grossman, Seth S.
Gruber, Corey D.
Gunter, Brett
Halinski, John W.
Hall, Christopher J.
Hardiman, Tara
Havranek, John F.
Hazuda, Mark
Heller, Susan J.
Hess, David
Hewitt, Ronald
Heyman, David
Hill, Alice
Hill, Mark
Hochman, Kathleen
Hoggan, Kelly C.
Holterman, Keith
Homan, Tom
Houser, Eric
Hylton, Roberto L.
Ingram, Deborah S.
Jensen, Robert
Johnson Perryman, Janet
Johnson, Daniel
Johnson, Edward H.
Johnson, James
Jones Jr., Berl D.
Jones, Franklin C.
Jones, Keith
Jones, Rendell
Joseph, Leonard
Karoly, Stephen
Kauffman, Keith
Kaufman, David J.
Keene, Kenneth D
Keiserman, Brad J.
Kendall, Sarah
Kerner, Francine
Kessler, Tamara
Kieserman, Brad J.
Kish, James R.
Kopel, Richard
Koumans, Marnix
Krizay, Glenn
Kronisch, Matthew L.
Kruger, Randy
Kruger, Mary
Kubiak, Lev J.
Langlois, Joseph
Lederer, Calvin M.
Legomsky, Stephen
Logan, Christopher
Looney, Robert
Luczko, George
Ludtke, Meghan G.
Lumpkins, Donald M.
Lyon, Shonnie
Mabeus, Steven
Magaw, Craig D.
Maher, Joseph B.
Mapar, Jalal
Marshall, Gregory
Martoccia, Anthony R.
Maughan, William
May, Major P.
Mayorkas, Alejandro
McAleenan, Kevin K.
McAllister, Scott
McClain, Ellen
McConnell, Bruce
McDonald, Christina E.
McMillan, Howard
McNamara, Philip
Meckley, Tammy
Melero, Mariela
Menna, Jenny
Merritt, Michael P.
Meyer, Jonathan E.
Micone, Vincent
Mihalko, George
Miles, John
Miller, David L.
Mitchell, Andrew
Mocny, Robert
Monica, Donald
Montgomery, Cynthia R.
Moore, Joseph
Morrissey, Paul S.
Moses, Patrick
Moynihan, Timothy M.
Mulligan, Ricci
Murphy, Jane P.
Murphy, John
Murphy, Kenneth D.
Muzyka, Carolyn
Myers, David L.
Napolitano, Janet
Nayak, Nick
Neptun, Daniel A.
Neufeld, Donald
Nicholson, David
Nimmich, Joseph L.
Novak, Michael R.
O'Connor, Kimberly
Odom, Maria
Okada, Ted T.
Olavarria, Esther
Oliver, Clifford E.
Onieal, Denis G.
Orner, Jeffrey
O'Toole, Tara
Palmer, David J.
Parent, Wayne
Paschall, Robert
Patrick, Connie L
Patterson, Leonard
Peavy, Sandy H.
Penn, Damon C.

Philbin, Patrick
Phillips, Sally
Pierson, Julia A.
Pietropaoli, Lori
Potts, Michael
Pressman, David
Pupillo, Dale A.
Quijas, Louis
Ramanathan, Sue
Ramirez, Edgar
Rausch, Sharia
Redman, Kathy
Renaud, Daniel
Renaud, Tracy
Reuther, Kurt
Rhew, Perry
Richardson, Gregory
Riordan, Denis
Robbins, Tim
Robinson, David M.
Robinson, George A.
Roche, William W.
Rodriguez, Waldemar
Rogers, Debra
Rudolph, Alan
Ruppel, Joanna
Russell, Anthony A.
Russell, Michael
Ryan, Paul
Rynes, Joel
Salazar, Ronald
Saliunas, Barbara
Salvatore, Joseph C.
Sandweg, John
Saunders, Steve D.
Savastana, Anthony J.
Schied, Eugene H.
Schmelzinger, Gilbert
Schoening, Donald
Scholz, Dawn
Schreiber, Tonya
Schwartz, Mark
Scialabba, Lori
Seale, Mary
Sekar, Radha C.
Sevier, Adrian
Shelton Waters, Karen R.
Sherry, Peggy
Shlossman, Amy
Smislova, Melissa
Smith, A.T.
Smith, Douglas
Smith, Eric T.
Smith, Gordon
Solheim, Linda
Spampinato Jr., Francis C.
Spaulding, Suzanne
Stallworth, Charles E.
Stanley, Kathleen
Stanton, John
Stempfley, Roberta
Stevens, Clark
Strack, Barbara
Streufert, John
Stroud, Dennis M.
Sutherland, Daniel
Swacina, Linda
Swain, Donald
Swartz, Neal J.
Swengros, Richard
Tarry, William
Tate, Cornelius F.
Taylor, Charles
Teets, Gregory L.
Tennyson, Stephanie L.
Thomas, Rob C.
Thompson, John
Tierney, MaryAnn E.
Toler, Jacob
Tomsheck, James F.
Torrence, Donald
Triner, Donald
Trissell, David A.
Tuttle, James
Ulianko, John
Vanison, Denise
Vasquez JR, Leopoldo R.
Velarde, Barbara
Velasquez III, Andrew
Venture, Veronica
Veysey, Anne
Vincent, Peter S.
Walke, James A.
Walther, Kelli
Walton, Kimberly H.
Ward, Nancy L.
Ward, Patrice
Warrick, Thomas
Wenchel, Rosemary
Williams, Dwight M.
Williams, Gerard J.
Williams, Richard
Winchell, Leigh
Windham, Nicole
Winkowski, Thomas S.
Wong, Heather
Woodard, Steven C.
Wright, Joseph W
Wright, Roy E.
Wulf, David
Yeager, Michael J.
Zabko, John
Zelvin, Lawrence
Zimmerman, Elizabeth A.

This notice does not constitute a significant regulatory action under section 3(f) of Executive Order 12866. Therefore, DHS has not submitted this notice to the Office of Management and Budget. Further, because this notice is a matter of agency organization, procedure and practice, DHS is not required to follow the rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553).

Dated: July 18, 2013.

Shonna R. James,

Director, Executive Resources, Office of the Chief Human Capital Officer.

[FR Doc. 2013–17808 Filed 7–23–13; 8:45 am]

BILLING CODE 9110–9B–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–63]

30-Day Notice of Proposed Information Collection: Fellowship Placement Pilot Program Evaluation

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* August 23, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on May 7, 2013.

A. Overview of Information Collection

Title of Information Collection: Fellowship Placement Pilot Program Evaluation.

OMB Approval Number: 2528—New.

Type of Request: New collection.

Form Number: None.

Description of the need for the information and proposed use: The Fellowship Placement Program places highly-skilled fellows in distressed cities to work on strategic projects and help build city capacity. The fellowship program is seeking to evaluate its program through surveys of program stakeholders.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours to complete a survey is 1 hour. The number of respondents is estimated to be 32 respondents. The total number of burden hours is 32 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Dated: July 16, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–17778 Filed 7–23–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5694–N–02]

Mortgage and Loan Insurance Programs Under the National Housing Act—Debenture Interest Rates

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

ACTION: Notice.

SUMMARY: This notice announces changes in the interest rates to be paid on debentures issued with respect to a loan or mortgage insured by the Federal Housing Administration under the provisions of the National Housing Act (the Act). The interest rate for debentures issued under section 221(g)(4) of the Act during the 6-month period beginning July 1, 2013, is 1¾ percent. The interest rate for debentures issued under any other provision of the Act is the rate in effect on the date that the commitment to insure the loan or mortgage was issued, or the date that the loan or mortgage was endorsed (or initially endorsed if there are two or more endorsements) for insurance, whichever rate is higher. The interest rate for debentures issued under these other provisions with respect to a loan or mortgage committed or endorsed during the 6-month period beginning July 1, 2013, is 2⅞ percent. However, as a result of an amendment to section 224 of the Act, if an insurance claim relating to a mortgage insured under sections 203 or 234 of the Act and endorsed for insurance after January 23, 2004, is paid in cash, the debenture interest rate for purposes of calculating a claim shall be the monthly average yield, for the month in which the default on the mortgage occurred, on United States Treasury Securities adjusted to a constant maturity of 10 years.

FOR FURTHER INFORMATION CONTACT: Yong Sun, Department of Housing and Urban Development, 451 Seventh Street SW., Room 5148, Washington, DC 20410–8000; telephone (202) 402–4778 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Section 224 of the National Housing Act (12 U.S.C. 1715o) provides that debentures issued under the Act with respect to an insured loan or mortgage (except for debentures issued pursuant to section 221(g)(4) of the Act) will bear interest at the rate in effect on the date the commitment to insure the loan or mortgage was issued, or the date the loan or mortgage was endorsed (or initially endorsed if there are two or more endorsements) for insurance, whichever rate is higher. This provision is implemented in HUD's regulations at 24 CFR 203.405, 203.479, 207.259(e)(6), and 220.830. These regulatory provisions state that the applicable rates of interest will be published twice each year as a notice in the **Federal Register**.

Section 224 further provides that the interest rate on these debentures will be set from time to time by the Secretary of HUD, with the approval of the Secretary of the Treasury, in an amount not in excess of the annual interest rate determined by the Secretary of the Treasury pursuant to a statutory formula based on the average yield of all outstanding marketable Treasury obligations of maturities of 15 or more years.

The Secretary of the Treasury (1) has determined, in accordance with the provisions of section 224, that the statutory maximum interest rate for the period beginning July 1, 2013, is 2⅞ percent; and (2) has approved the establishment of the debenture interest rate by the Secretary of HUD at 2⅞ percent for the 6-month period beginning July 1, 2013. This interest rate will be the rate borne by debentures issued with respect to any insured loan or mortgage (except for debentures issued pursuant to section 221(g)(4)) with insurance commitment or endorsement date (as applicable) within the latter 6 months of 2013.

For convenience of reference, HUD is publishing the following chart of debenture interest rates applicable to mortgages committed or endorsed since January 1, 1980:

Effective interest rate	On or after	Prior to
9½	Jan. 1, 1980	July 1, 1980
9⅞	July 1, 1980	Jan. 1, 1981
11¾	Jan. 1, 1981	July 1, 1981
12⅞	July 1, 1981	Jan. 1, 1982
12¾	Jan. 1, 1982	Jan. 1, 1983
10¼	Jan. 1, 1983	July 1, 1983
10⅜	July 1, 1983	Jan. 1, 1984
11½	Jan. 1, 1984	July 1, 1984
13⅜	July 1, 1984	Jan. 1, 1985

Effective interest rate	On or after	Prior to
11⅝	Jan. 1, 1985	July 1, 1985
11⅛	July 1, 1985	Jan. 1, 1986
10¼	Jan. 1, 1986	July 1, 1986
8¼	July 1, 1986	Jan. 1. 1987
8	Jan. 1, 1987	July 1, 1987
9	July 1, 1987	Jan. 1, 1988
9⅛	Jan. 1, 1988	July 1, 1988
9⅜	July 1, 1988	Jan. 1, 1989
9¼	Jan. 1, 1989	July 1, 1989
9	July 1, 1989	Jan. 1, 1990
8⅛	Jan. 1, 1990	July 1, 1990
9	July 1, 1990	Jan. 1, 1991
8¾	Jan. 1, 1991	July 1, 1991
8½	July 1, 1991	Jan. 1, 1992
8	Jan. 1, 1992	July 1, 1992
8	July 1, 1992	Jan. 1, 1993
7¾	Jan. 1, 1993	July 1, 1993
7	July 1, 1993	Jan. 1, 1994
6⅝	Jan. 1, 1994	July 1, 1994
7¾	July 1, 1994	Jan. 1, 1995
8⅜	Jan. 1, 1995	July 1, 1995
7¼	July 1, 1995	Jan. 1, 1996
6½	Jan. 1, 1996	July 1, 1996
7¼	July 1, 1996	Jan. 1, 1997
6¾	Jan. 1, 1997	July 1, 1997
7⅛	July 1, 1997	Jan. 1, 1998
6⅜	Jan. 1, 1998	July 1, 1998
6⅛	July 1, 1998	Jan. 1, 1999
5½	Jan. 1, 1999	July 1, 1999
6⅛	July 1, 1999	Jan. 1, 2000
6½	Jan. 1, 2000	July 1, 2000
6½	July 1, 2000	Jan. 1, 2001
6	Jan. 1, 2001	July 1, 2001
5⅞	July 1, 2001	Jan. 1, 2002
5¼	Jan. 1, 2002	July 1, 2002
5¾	July 1, 2002	Jan. 1, 2003
5	Jan. 1, 2003	July 1, 2003
4½	July 1, 2003	Jan. 1, 2004
5⅛	Jan. 1, 2004	July 1, 2004
5½	July 1, 2004	Jan. 1, 2005
4⅞	Jan. 1, 2005	July 1, 2005
4½	July 1, 2005	Jan. 1, 2006
4⅞	Jan. 1, 2006	July 1, 2006
5⅜	July 1, 2006	Jan. 1, 2007
4¾	Jan. 1, 2007	July 1, 2007
5	July 1, 2007	Jan. 1, 2008
4½	Jan. 1, 2008	July 1, 2008
4⅝	July 1, 2008	Jan. 1, 2009
4⅛	Jan. 1, 2009	July 1, 2009
4⅛	July 1, 2009	Jan. 1, 2010
4¼	Jan. 1, 2010	July 1, 2010
4⅛	July 1, 2010	Jan. 1, 2011
3⅞	Jan. 1, 2011	July 1, 2011
4⅛	July 1, 2011	Jan. 1, 2012
2⅞	Jan. 1, 2012	July 1, 2012
2¾	July 1, 2012	Jan. 1, 2013
2½	Jan. 1, 2013	July 1, 2013
2⅞	July 1, 2013	Jan. 1, 2014

Section 215 of Division G, Title II of Pub. L. 108–199, enacted January 23, 2004 (HUD's 2004 Appropriations Act) amended section 224 of the Act, to change the debenture interest rate for purposes of calculating certain insurance claim payments made in cash. Therefore, for all claims paid in cash on mortgages insured under section 203 or 234 of the National Housing Act and endorsed for insurance after January 23, 2004, the debenture interest rate will be the monthly average yield, for the month in which the default on the mortgage occurred, on United States Treasury Securities adjusted to a constant maturity of 10 years, as found in Federal Reserve Statistical Release H–15. The Federal Housing Administration has codified this provision in HUD regulations at 24 CFR 203.405(b) and 24 CFR 203.479(b).

Section 221(g)(4) of the Act provides that debentures issued pursuant to that paragraph (with respect to the assignment of an insured mortgage to the Secretary) will bear interest at the ''going Federal rate'' in effect at the time the debentures are issued. The term ''going Federal rate'' is defined to mean the interest rate that the Secretary of the Treasury determines, pursuant to a statutory formula based on the average yield on all outstanding marketable Treasury obligations of 8- to 12-year maturities, for the 6-month periods of January through June and July through December of each year. Section 221(g)(4) is implemented in the HUD regulations at 24 CFR 221.255 and 24 CFR 221.790.

The Secretary of the Treasury has determined that the interest rate to be borne by debentures issued pursuant to section 221(g)(4) during the 6-month period beginning July 1, 2013, is 1¾ percent.

The subject matter of this notice falls within the categorical exemption from HUD's environmental clearance procedures set forth in 24 CFR 50.19(c)(6). For that reason, no environmental finding has been prepared for this notice.

Authority: Sections 211, 221, 224, National Housing Act, 12 U.S.C. 1715b, 1715l, 1715o; Section 7(d), Department of HUD Act, 42 U.S.C. 3535(d).

Dated: July 18, 2013.

Carol J. Galante,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2013–17773 Filed 7–23–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. 5726–N–02]

Notice of HUD-Held Multifamily & Healthcare Loan Sale, (MHLS 2013–2)

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

ACTION: Notice of sale of mortgage loans.

SUMMARY: This notice announces HUD's intention to sell certain unsubsidized multifamily and healthcare mortgage loans, without Federal Housing Administration (FHA) insurance, in a competitive auction (MHLS 2013–2) on July 31, 2013. This notice also describes generally the bidding process for the sale and certain persons who are ineligible to bid.

DATES: A Bidder's Information Package (BIP) will be made available on July 1, 2013. Bids for the loans must be submitted on the bid date of July 31, 2013. HUD anticipates that awards will be made on or before August 5th, 2013. Closings are expected to take place between August 13, 2013 and August 20, 2013.

ADDRESSES: To become a qualified bidder and receive the BIP, prospective bidders must complete, execute, and submit a Confidentiality Agreement and a Qualification Statement acceptable to HUD. Both documents will be available on the HUD Web site at *www.hud.gov/fhaloansales.* Please mail and fax executed documents to JS Watkins Realty Partners, LLC:

J.S. Watkins Realty Partners, LLC, c/o The Debt Exchange, 133 Federal Street, 10th Floor, Boston, MA 02111, Attention: MHLS 2013–2 Sale Coordinator, Fax: 1–978–967–8607.

FOR FURTHER INFORMATION CONTACT: John Lucey, Deputy Director, Asset Sales Office, Room 3136, U.S. Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410–8000; telephone 202–708–2625, extension 3927. Hearing- or speech-impaired individuals may call 202–708–4594 (TTY). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: HUD announces its intention to sell, in MHLS 2013–2, certain unsubsidized multifamily and healthcare mortgage loans (Mortgage Loans) secured by four (4) healthcare properties located in Texas and Florida and six (6) multifamily properties located Texas, Michigan, Florida, North Carolina and Tennessee. The Mortgage Loans are non-performing mortgage loans. The listing of the Mortgage Loans is included in the BIP. The Mortgage Loans will be sold without FHA insurance and with HUD servicing released. HUD will offer qualified bidders an opportunity to bid competitively on the Mortgage Loans.

Qualified bidders may submit bids on all Mortgage Loans or may bid on individual loans. A mortgagor of one or more Mortgage Loans who is a qualified bidder may submit an individual bid on its own Mortgage Loan. Interested mortgagors should review the Qualification Statement to determine whether they may be eligible to qualify to submit bids on one or more pools of Mortgage Loans or on individual loans in MHLS 2013–2.

The Bidding Process

The BIP describes in detail the procedure for bidding MHLS 2013–2. The BIP also includes a standardized non-negotiable loan sale agreement (Loan Sale Agreement).

As part of its bid, each bidder must submit a minimum deposit of the greater of 10% of the total bid or $100,000. HUD will evaluate the bids submitted and determine the successful bid(s) in its sole and absolute discretion. If a bidder is successful, the bidder's deposit will be non-refundable and will be applied toward the purchase price, with any amount beyond the purchase price being returned to the bidder. Deposits will be returned to unsuccessful bidders. Closings are expected to take place between August 13, 2013 and August 20, 2013.

These are the essential terms of sale. The Loan Sale Agreement, which is included in the BIP, contains additional terms and details. To ensure a competitive bidding process, the terms of the bidding process and the Loan Sale Agreement are not subject to negotiation.

Due Diligence Review

The BIP describes the due diligence process for reviewing loan files in MHLS 2013–2. Qualified bidders will be able to access loan information remotely via a high-speed Internet connection. Further information on performing due diligence review of the Mortgage Loans is provided in the BIP.

Mortgage Loan Sale Policy

HUD reserves the right to add Mortgage Loans to or delete Mortgage Loans from MHLS 2013–2 at any time prior to the Award Date. HUD also reserves the right to reject any and all bids, in whole or in part, without prejudice to HUD's right to include any Mortgage Loans in a later sale. Mortgage Loans will not be withdrawn after the Award Date except as is specifically provided in the Loan Sale Agreement.

This is a sale of unsubsidized mortgage loans, pursuant to Section 204(a) of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997, (12 U.S.C. 1715z–11a(a)).

Mortgage Loan Sale Procedure; New Offering Format

HUD selected a competitive sale as the method to sell the Mortgage Loans. This method of sale optimizes HUD's return on the sale of these Mortgage Loans, affords the greatest opportunity for all qualified bidders to bid on the Mortgage Loans, and provides the quickest and most efficient vehicle for HUD to dispose of the Mortgage Loans. Depending on the bids received from the competitive closed auction of the healthcare notes, HUD reserves the option to conduct a second tier of bidding utilizing an open English auction for these notes. Specific details of the auction process are provided in the BIP.

Bidder Eligibility

In order to bid in the sale, a prospective bidder must complete, execute and submit both a Confidentiality Agreement and a Qualification Statement acceptable to HUD. The following individuals and entities are ineligible to bid on any of the Mortgage Loans included in MHLS 2013–2:

1. Any employee of HUD, a member of such employee's household, or an entity owned or controlled by any such employee or member of such an employee's household;

2. Any individual or entity that is debarred, suspended, or excluded from doing business with HUD pursuant to Title 24 of the Code of Federal Regulations, Part 24, and Title 2 of the Code of Federal Regulations, Part 24;

3. Any contractor, subcontractor and/or consultant or advisor (including any agent, employee, partner, director, principal or affiliate of any of the foregoing) who performed services for, or on behalf of, HUD in connection with MHLS 2013–2;

4. Any individual who was a principal, partner, director, agent or employee of any entity or individual described in subparagraph 3 above, at any time during which the entity or individual performed services for or on behalf of HUD in connection with MHLS 2013–2;

5. Any individual or entity that uses the services, directly or indirectly, of any person or entity ineligible under subparagraphs 1 through 4 above to assist in preparing any of its bids on the Mortgage Loans;

6. Any individual or entity which employs or uses the services of an employee of HUD (other than in such employee's official capacity) who is involved in MHLS 2013–2;

7. Any affiliate, principal or employee of any person or entity that, within the two-year period prior to July 1, 2013, serviced any of the Mortgage Loans or performed other services for or on behalf of HUD;

8. Any contractor or subcontractor to HUD that otherwise had access to information concerning the Mortgage Loans on behalf of HUD or provided services to any person or entity which, within the two-year period prior to July 1, 2013, had access to information with respect to the Mortgage Loans on behalf of HUD;

9. Any employee, officer, director or any other person that provides or will provide services to the potential bidder with respect to such Mortgage Loans during any warranty period established for the Loan Sale, that serviced any of the Mortgage Loans or performed other services for or on behalf of HUD or within the two-year period prior to July 1, 2013, provided services to any person or entity which serviced, performed services or otherwise had access to information with respect to the Mortgage Loans for or on behalf of HUD;

10. Any mortgagor or operator that failed to submit to HUD on, or before July 15th, 2013 audited financial statements for fiscal years 2010 through 2012 (for such time as the project has been in operation or the prospective bidder served as operator, if less than three (3) years) for a project securing a Mortgage Loan;

11. Any individual or entity, and any Related Party (as such term is defined in the Qualification Statement) of such individual or entity, that is a mortgagor in any of HUD's multifamily and/or healthcare housing programs and that is in default under such mortgage loan or is in violation of any regulatory or business agreements with HUD and fails to cure such default or violation by no later than July 15, 2013.

The Qualification Statement provides further details pertaining to eligibility requirements. Prospective bidders should carefully review the Qualification Statement to determine whether they are eligible to submit bids on the Mortgage Loans in MHLS 2013–2.

Freedom of Information Act Requests

HUD reserves the right, in its sole and absolute discretion, to disclose information regarding MHLS 2013–2, including, but not limited to, the identity of any successful bidder and its bid price or bid percentage for any pool of loans or individual loan, upon the closing of the sale of all the Mortgage Loans. Even if HUD elects not to publicly disclose any information relating to MHLS 2013–2, HUD will have the right to disclose any information that HUD is obligated to disclose pursuant to the Freedom of Information Act and all regulations promulgated thereunder.

Scope of Notice

This notice applies to MHLS 2013–2 and does not establish HUD's policy for the sale of other mortgage loans.

Dated: July 18, 2013.

Carol J. Galante,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2013–17775 Filed 7–23–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5693–N–04]

Implementation of the Privacy Act of 1974, as Amended; Action To Modify and Terminate an Existing System of Records Publication

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice Modification and Termination.

SUMMARY: Pursuant to the Privacy Act of 1974 (U.S.C. 552a(e)(4)), as amended, and Office of Management and Budget (OMB), Circular No. A–130, the Department of Housing and Urban Development (HUD), Office of Assets Sales provides notice that it wishes to alter the ''Delinquent/Default/Assigned/Temporary Mortgage Assistance Payments Program'' system of records publication. Subsequent modifications include a system name change to ''Federal Housing Administration Loan Sale File'', the removal and addition of new data disclosure requirements, and refinement to the categories of: ''Individuals Covered by the System'' and ''Records Maintained by the System''. Consequent changes meet the threshold requirements for filing a report with OMB and Congress. All revisions are conducted to reflect the present status of the information contained in this system. This notice supersedes and terminates the ''Delinquent/Default/Assigned/Temporary Mortgage Assistance Payments Program'' system of records. The record system will continue to be utilized in the marketing of housing assets, to identify qualified potential purchasers, and to solicit bids for assets.

This system supports HUD's FHA Single Family Asset Sales liquidation functions. As such, potential investors will be granted preview rights to sample mortgage records pursuant to an executed agreement. A more detailed description of the purpose of the system is contained in the purpose section of this notice.

DATES: *Effective Date:* This notice shall become effective, without further notice August 23, 2013, unless comments are received during or before this period which would result in a contrary determination.

Comments Due Date: August 23, 2013.

FOR FURTHER INFORMATION CONTACT: Donna Robinson-Staton, Chief Privacy Officer, 451 Seventh Street SW., Washington, DC 20410 (Attention: Capitol View Building, 4th Floor), telephone number: (202) 402–8073. [The above telephone number is not a toll free number.] A telecommunications device for hearing- and speech-impaired persons (TTY) is available by calling the Federal Relay Service's toll-free telephone number (800) 877–8339.

Authority: 5 U.S.C. 552a; 88 Stat. 1896; 42 U.S.C. 3535(d).

Dated: July 12, 2013.

Barbara Elliott,

Acting Chief Information Officer.

SYSTEM OF RECORDS NO.: SFH/HWS.1

SYSTEM NAME:

Federal Housing Administration Loan Sale File—Replacement for the Delinquent/Default/Assigned/Temporary Mortgage Assistance Payments Program.

SYSTEM LOCATION:

451 Seventh Street SW., Washington, DC 20410. Debt Exchange, Inc., 133 Federal Street, 10th Floor, Boston, MA 02110 will maintain some records on the loan sale program, and NARA for archival purposes.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Mortgagors with HUD/FHA insured single-family mortgages that are delinquent or in default; mortgagors seeking assistance to prevent foreclosures; and mortgagors whose mortgages are held by HUD.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in this system consist of the following information which is provided to HUD by mortgage servicing entities that include: Mortgage loan origination information and servicing histories, loss mitigation and payment histories, notices of delinquent mortgages, FHA case numbers, current unpaid principal balance, current scheduled principal and interest payment, current interest rate, day month and year through which the mortgage is paid, date of last payment, amount of last payment, payments in last 12 months, escrow balance, mortgage rate, origination date, original balance, first payment date, maturity date, original term, remaining months to maturity, payment frequency, date of last modification, manner in which title held, subordinate liens and lien priority, original appraised value, original loan to value ratio, borrower credit scores and date of credit report, borrowers' current income, mortgage debt to income ratios, borrower employment status, date foreclosure initiated, borrower bankruptcies, date loan referred for foreclosure, date of complaint or petition for foreclosure, date of foreclosure sales, deeds of trust; and related correspondence. In addition, records in the system will include loan payment performance information and information pertaining to the history of the servicing of the loan, which include the number of default episodes, the length of the between loan origination and the first default episode, and information pertaining to prior loan modifications files.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The authority for maintenance of the system: Sec. 204(g) of the National Housing Act 12 U.S.C. 1710(g).

PURPOSE(S):

The Federal Housing Administration (''FHA'') Loan Sale File is used to make financial information available to prospective investors purchasing defaulted FHA-insured loans. The FHA insures mortgages on single-family homes and pays insurance claims to lenders upon the mortgagor's default. After paying an insurance claim submitted by a lender on a defaulted mortgage loan, the FHA must utilize various disposition strategies to reduce claim costs and maximize recoveries to the mortgage insurance funds. One such disposition strategy is the FHA Loan Sale Program, which offers pools of defaulted single-family loan for competitive bid at auction. Investors purchase the loans based on their determination of potential returns following acquisition. In order to maximize recovery to FHA and enable prospective purchasers to calculate pricing, FHA makes due diligence information available to prospective bidders. This information consists of detailed loan-level information, which is reviewed by bidders to evaluate investment potential. The availability of this due diligence information enhances pricing, improves returns, reduces claim costs and maximizes recovery to the FHA insurance funds.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act. In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, HUD may disclose information contained in this system of records without the consent of the subject individual in accordance with its discretionary disclosures, when such disclosure is compatible with the purpose for which the record was collected providing that approval is obtained from the HUD's system manager, only after satisfactory justification has been provided to the system manager, records may be disclosed. Please refer to HUD discretionary blanket routine uses [1] to see those uses that may be applicable to this system. Other routine uses applying to this system are as follows:

(a) To the Internal Revenue Service for the purpose of administering tax reporting requirements.

(b) To General Accounting Office for the purpose of performing audit for investigations, or oversight of operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

(c) To HUD loan sale contractors to assist in the marketing and sale of loans, real estate, or other assets held by the HUD; due diligence information provided by prospective bidders will be granted pursuant to an executed confidentiality agreement.

(d) To prospective purchasers (or any other individual or entities) who have signed an executed confidentiality agreement.

(e) To consumer reporting agencies: Disclosure pursuant to 5 U.S.C. 552a(b)(12). Pursuant to 5 U.S.C. 552a(b)(12), disclosures may be made to a consumer reporting agency as defined in the Fair Reporting Act (15 U.S.C. 1681a(f) or the Federal Claims Collection Act of 1966 31 U.S.C. 3701(a)(3).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

In file folders, desks and on computer server, magnetic tapes, drums, and discs, and NARA for archival purposes.

RETRIEVABILITY:

Name; case file number, property address.

SAFEGUARDS:

Records are maintained in lockable file cabinets; access to automated systems is by passwords and code identification cards access limited to authorized personnel. Access to due diligence information by prospective purchasers is subject to execution of a Confidentiality Agreement including specific requirements for the safeguarding of Personally Identifiable Information.

RETENTION AND DISPOSAL:

All electronic due diligence files received and posted by FHA contractors are returned to FHA's Asset Sales Office

[1] *http://portal.hud.gov/hudportal/documents/huddoc?id=append1.pdf.*

at the expiration of the contract term. Electronic data files returned to HUD by contractors are maintained in accordance with HUD's Records Disposition Schedule, Handbook 2225.6, 7.1–10; Retain, archive, destroy as designated by schedule. Records can be destroyed when the destruction date is reached. As such, manual records will be destroyed by shredding or burning; electronic records will be disposed in accordance with IT Security Handbook 2400.25, 4.7.6.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Asset Sales Office, Department of Housing and Urban Development, 451 Seventh Street SW., insert room number, Washington, DC 20410.

NOTIFICATION AND ACCESS PROCEDURES:

For information, assistance, or inquiry about the existence of records, contact the Chief Privacy Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4156, Washington, DC 20410. (Attention: Capitol View Building, 4th Floor). Provide verification of your identity by providing two proofs of official identification. Your verification of identity must include your original signature and must be notarized. The Department's rules for providing access to records to the individual concerned appear in 24 CFR Part 16.

CONTESTING RECORDS PROCEDURES:

The Department's rules for contesting the contents of records and appealing initial denials, by the individual concerned, appear in 24 CFR Part 16. If additional information or assistance is needed, it may be obtained by contacting:

(i) In relation to contesting contents of records, the Privacy Act Officer at the appropriate location.

(ii) In relation to appeals of initial denials, the HUD Departmental Privacy Appeals Officer, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

The source of records are subject individual; other individuals; current or previous employers; credit bureaus; financial institutions; other corporations or firms; Federal Government agencies; non-federal government (including foreign, state and local) agencies; law enforcement agencies.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 2013–17780 Filed 7–23–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2013–N155; FXES11130100000_134_FF01E00000]

Endangered and Threatened Wildlife and Plants; Recovery Permit Application

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following application for a recovery permit to conduct activities with the purpose of enhancing the survival of an endangered species. The Endangered Species Act of 1973, as amended (Act), prohibits certain activities with endangered species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing such permits.

DATES: To ensure consideration, please send your written comments by August 23, 2013.

ADDRESSES: Endangered Species Program Manager, Ecological Services, U.S. Fish and Wildlife Service, Pacific Regional Office, 911 NE 11th Avenue, Portland, OR 97232–4181. Please refer to the permit number for the application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Colleen Henson, Fish and Wildlife Biologist, at the above address or by telephone (503–231–6131) or fax (503–231–6243).

SUPPLEMENTARY INFORMATION:

Background

The Act (16 U.S.C. 1531 *et seq.*) prohibits certain activities with respect to endangered and threatened species unless a Federal permit allows such activity. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR 17, the Act provides for certain permits, and requires that we invite public comment before issuing these permits for endangered species.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes the permittee to conduct activities (including take or interstate commerce) with respect to U.S. endangered or threatened species for scientific purposes or enhancement of propagation or survival. Our regulations implementing section 10(a)(1)(A) of the Act for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Application Available for Review and Comment

We invite local, State, and Federal agencies, and the public to comment on the following application. Please refer to the appropriate permit number for the application when submitting comments.

Documents and other information submitted with this application are available for review by request from the Endangered Species Program Manager at the address listed in the **ADDRESSES** section of this notice, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and the Freedom of Information Act (5 U.S.C. 552).

Permit Number: TE–09155B

Applicant: Renee Ha, University of Washington, Seattle, Washington

The applicant requests a permit to take (harass by survey; locate and monitor nests of; capture, band, weigh, and measure; collect blood samples for; attach radio transmitters to; and track) the Mariana crow (*Corvus kubaryi*) in conjunction with survey and population monitoring activities on the island of Rota, Commonwealth of the Northern Mariana Islands, for the purpose of enhancing the species' survival.

Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*).

Dated: July 17, 2013.

Richard R. Hannan,

Acting Regional Director, Pacific Region, U.S. Fish and Wildlife Service.

[FR Doc. 2013–17766 Filed 7–23–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2013–N133; FF08E00000–FXES11120800000F2–123–F2]

Draft Environmental Assessment and Proposed Cross Valley Transmission Line Habitat Conservation Plan, Tulare County, California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; receipt of permit application, draft environmental assessment, proposed habitat conservation plan: request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have prepared a draft environmental assessment (EA) under the National Environmental Policy Act of 1969, as amended (NEPA), in response to an application from Southern California Edison (the Applicant) for an incidental take permit (ITP) pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The application addresses the proposed incidental take (take) of 13 proposed Covered Species within a 3,385-acre Permit Area during a proposed permit term of 30 years. The Applicant has prepared the draft Cross Valley Transmission Line Habitat Conservation Plan (Cross Valley Line HCP) (HCP) to describe and implement a conservation plan that will minimize and mitigate environmental effects associated with the construction, operation, and maintenance of the Cross Valley Loop Transmission Line, an electrical transmission project in central Tulare County, California. We also announce a 45-day public comment period on the permit application, including the draft EA and the proposed HCP. We request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party.

DATES: To ensure consideration, please send your written comments by September 9, 2013.

ADDRESSES: Please address written comments to Nina Bicknese, Senior Fish and Wildlife Biologist, Sacramento Fish and Wildlife Office, 2800 Cottage Way, W–2605, Sacramento, CA 95825. Alternatively, you may send comments by facsimile to (916) 414–6713.

FOR FURTHER INFORMATION CONTACT: Mike Thomas, Chief, Conservation Planning Division, or Eric Tattersall, Deputy Assistant Field Supervisor, at the address shown above or at (916) 414–6600 (telephone). If you use a telecommunications device for the deaf, please call the Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: We publish this notice under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321–4347 *et seq.;* NEPA), and its implementing regulations in the Code of Federal Regulations (CFR) at 40 CFR 1500–1508, as well as in compliance with section 10(c) of the Endangered Species Act (16 U.S.C. 1531–1544 *et seq.;* Act).

Availability of Documents

You may obtain copies of the draft EA, the draft HCP, and the permit application from the individuals in **FOR FURTHER INFORMATION CONTACT**, or from the Sacramento Fish and Wildlife Office Web site at *http://www.fws.gov/sacramento.* Copies of these documents are also available for public inspection, by appointment, during regular business hours, at the Sacramento Fish and Wildlife Office (see **ADDRESSES**).

Background Information

Section 9 of the Act (16 U.S.C. 1531–1544 *et seq.*) and Federal regulations prohibit the taking of fish and wildlife species listed as endangered or threatened under section 4 of the Act. Take of federally listed fish or wildlife is defined under the Act as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed species, or attempt to engage in such conduct. The term ''harass'' is defined in the regulations as to carry out actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering (50 CFR 17.3). The term ''harm'' is defined in the regulations as significant habitat modification or degradation that results in death or injury of listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3). However, under specified circumstances, the Service may issue permits that allow the take of federally listed species, provided that the take that occurs is incidental to, but not the purpose of, an otherwise lawful activity. Regulations governing permits for endangered and threatened species are at 50 CFR 17.22 and 17.32, respectively. Section 10(a)(1)(B) of the Act contains provisions for issuing such incidental take permits to non-Federal entities for the take of endangered and threatened species, provided the following criteria are met:

1. The taking will be incidental;
2. The applicants will, to the maximum extent practicable, minimize and mitigate the impact of such taking;
3. The applicants will develop a proposed HCP and ensure that adequate funding for the HCP will be provided;
4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
5. The applicants will carry out any other measures that the Service may require as being necessary or appropriate for the purposes of the HCP.

The draft HCP addresses, and the Applicant seeks incidental take authorization for, 13 species, including 10 animal species (4 federally endangered, 3 federally threatened, and 3 unlisted) and 3 plant species (2 federally threatened, 1 unlisted). The proposed permit would provide take authorization for all species identified in the draft HCP as a Covered Species. Take authorized for listed Covered Species would be effective upon permit issuance. Take authorization for currently unlisted Covered Species would become effective concurrent with listing, should the species be listed under the Act during the proposed 30-year Permit Term.

The proposed ITP would include the following nine federally listed species: the threatened vernal pool fairy shrimp (*Branchinecta lynchi*), the endangered vernal pool tadpole shrimp (*Lepidurus packardi*), the threatened valley elderberry longhorn beetle (*Desmocerus californicus dimorphus*), the threatened California tiger salamander (*Ambystoma californiense*), the endangered southwestern willow flycatcher (*Empidonax traillii extimus*), the endangered least Bell's vireo (*Vireo bellii pusillus*), the endangered San Joaquin kit fox (*Vulpes macrotis mutica*), the threatened Hoover's spurge (*Chamaesyce hooveri*), and the threatened San Joaquin Valley Orcutt grass (*Orcuttia inaequalis*). The unlisted species proposed for coverage under the draft HCP are the western spadefoot toad (*Spea hammondii*), the burrowing owl (*Athene cunicularia*), the little willow flycatcher (*Empidonax traillii brewsteri*), and the spiny-sepaled button-celery (*Eryngium spinosepalum*).

Implementation of Covered Activities described in the proposed HCP would construct a new 23-mile-long double-circuit 220 kV transmission line (including construction of 90 new 160-foot tubular-steel poles [TSPs] and 16 new 12-foot lattice steel towers [LSTs]); preparation of temporary work areas to allow for equipment access, use, and staging during construction; access road construction; improvements to existing access roads; use of existing laydown yards; and activities associated with future operation and maintenance of the new transmission line.

Specifically, the Applicant is requesting coverage for incidental take resulting from the following seven categories of construction Covered Activities:

(1) operation and restoration of existing laydown yards;

(2) construction of new dirt access roads;

(3) improvement and repair of existing access roads;

(4) construction of transmission line structures (TSPs and LSTs);

(5) stringing of electrical conductors (electrical wires) and the optical ground wire on the transmission line structures;

(6) installation of Storm Water Pollution Prevention Plan best management practices; and

(7) implementation of avoidance and minimization measures.

In addition, the Applicant is also requesting coverage for incidental take resulting from the following 13 categories of operation and maintenance Covered Activities that will be implemented over the proposed 30-year Permit term:

(1) the aerial inspections of the operational Cross Valley Loop Transmission Line using helicopters or fixed-wing aircraft;

(2) routine transmission line ground patrols;

(3) optical ground wire testing;

(4) minor and major repairs to TSPs and LSTs;

(5) minor and major repairs or replacement of conductors and the optical ground wire;

(6) insulator washing;

(7) replacement of one TSP or one LST structure;

(8) repair/replacement of bird flight diverters;

(9) access road maintenance;

(10) access road drainage-structure maintenance or replacement;

(11) installation of Storm Water Pollution Prevention Plan best management practices during maintenance actions;

(12) tree pruning for vegetation management; and

(13) brush and weed abatement for vegetation management.

The proposed Covered Activities would result in the permanent or temporary disturbance of up to 199 acres of existing landcover within the proposed 3,385-acre Permit Area. The proposed Permit Area comprises natural and anthropomorphic landcover types, including annual grassland, vernal pools, riparian woodland, agricultural fields, orchards, vineyards, irrigated pastures, urban developments, and rural residential developments. Covered Activity impacts to existing landcover types were used as a surrogate to identify maximum potential impacts to species-suitable habitat and the potential take of each Covered Species. The proposed HCP conservation strategy prescribes conditions for implementing each Covered Activity that avoid or minimize potential take of the Covered Species, and identifies compensatory mitigation for species effects that cannot be avoided.

National Environmental Policy Act Compliance

Our proposed permit issuance decision triggers compliance with NEPA, which requires that environmental information be available to public officials and citizens before Federal decisions are made and before Federal actions are taken. We prepared the draft EA to inform the public of the proposed HCP; our proposed permit action; alternatives to that action; the environmental impacts of the alternatives including the proposed action; any adverse environmental effects that cannot be avoided; any irreversible commitments of resources, and to address comments received during early public scoping efforts.

Alternatives in the Draft Environmental Assessment

The Service is providing notice of the availability of our draft EA, which evaluates the impacts of the Proposed Action Alternative as well as a No Action Alternative.

No Action Alternative: Under the No Action Alternative, we would not issue an incidental take permit to the Applicant, the Applicant would not implement an HCP, and the Cross Valley Loop Transmission Line could not be constructed. The No Action Alternative would not address the Applicant's underlying electrical needs or existing substation electrical-overload problems, and would not achieve the Applicant's objectives in proposing a Cross Valley Loop Transmission Line.

Proposed Action Alternative: Under the Proposed Action Alternative, we would issue an incidental take permit for the Applicant's proposed HCP, which includes the Covered Activities and the conservation measures described above in Background Information, and described with more detail in the Applicant's Cross Valley Line HCP document.

Other Action Alternatives: Under Department of the Interior regulations for implementation of NEPA (43 CFR Part 46), when there are no unresolved conflicts about a proposed action with respect to alternative uses of the available resources, an environmental assessment need only consider the proposed action, and does not need to consider additional action alternatives, pursuant to section 102(2)(E) of NEPA. The Service has determined that the Proposed Action under consideration meets these requirements. Consequently, no additional action alternatives are analyzed in our draft EA.

Public Comments

We request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party on this notice. We particularly seek comments on the following:

1. Biological information concerning the species;

2. Relevant data concerning the species;

3. Additional information concerning the range, distribution, population size, and population trends of the species;

4. Current or planned activities in the subject area and their possible impacts on the species;

5. The presence of archeological sites, buildings and structures, historic events, sacred and traditional areas, and other historic preservation concerns, which are required to be considered in project planning by the National Historic Preservation Act; and

6. Identification of any other environmental issues that should be considered with regard to the proposed transmission line and permit action.

You may submit your comments and materials by one of the methods listed above in **ADDRESSES**. Comments and materials we receive, as well as supporting documentation we used in preparing the EA document, will be available for public inspection by appointment, during normal business hours, at our office (see **FOR FURTHER INFORMATION CONTACT**).

Public Availability of Comments

Before including your address, phone number, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—might be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice pursuant to section 10(c) of the Act and the NEPA public-involvement regulations (40 CFR 1500.1(b), 1500.2(d), and 1506.6).

Next Steps

We will evaluate the permit application, including the Applicant's HCP, and comments we receive to determine whether the application meets the requirements of section 10(a) of the Act. If the requirements are met, we will issue a permit to the Applicant for the incidental take of the 13 Covered Species from the implementation of the Covered Activities described in the Cross Valley Line HCP. We will make the final permit decision no sooner than September 23, 2013.

Dated: July 17, 2013.

Alexandra Pitts,

Regional Director, Pacific Southwest Region, Sacramento, California.

[FR Doc. 2013–17772 Filed 7–23–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2013–N137; FXES11130100000D2–134–FF01E00000]

Experimental Removal of Barred Owls To Benefit Threatened Northern Spotted Owls; Final Environmental Impact Statement

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of the final environmental impact statement (Final EIS) for experimental removal of barred owls to benefit threatened northern spotted owls. The barred owl, a species recently established in western North America, is displacing the northern spotted owl and threatening its viability. The Final EIS analyzes a no-action alternative and eight action alternatives to experimentally determine if removing barred owls will benefit northern spotted owl populations and to test the feasibility and efficiency of barred owl removal as a management tool. The action alternatives vary by the number and location of study areas, the type of experimental design, duration of study, and method of barred owl removal.

ADDRESSES: The Final EIS is available at:

• U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE 98th Ave., Suite 100, Portland, OR 97266; telephone 503–231–6179.

• *Internet: http://www.fws.gov/oregonfwo.*

FOR FURTHER INFORMATION CONTACT: Paul Henson, State Supervisor, Oregon Fish and Wildlife Office, at 503–231–6179. If you use a telecommunications device for the deaf, please call the Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

We, the U.S. Fish and Wildlife Service (Service), announce the availability of the Final EIS for experimental removal of barred owls to benefit threatened northern spotted owls. We are publishing this notice in compliance with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.;* NEPA) and its implementing regulations at 40 CFR 1506.6. The Final EIS evaluates the impacts of eight action alternatives and a no-action alternative related to: (1) Federal involvement in barred owl removal experiments, and (2) the possible issuance of one or more scientific collecting permits under the Migratory Bird Treaty Act (16 U.S.C. 703–712; MBTA) for lethal and nonlethal take of barred owls.

The northern spotted owl (*Strix occidentalis caurina*) is listed as threatened under the Endangered Species Act (16 U.S.C. 1531 *et seq.;* Act). Competition from barred owls (*Strix varia*) is identified as one of the main threats to the northern spotted owl in the 2011 *Revised Northern Spotted Owl Recovery Plan* (Recovery Plan) (USFWS 2011, p. III–62). To address this threat, the Recovery Plan recommends designing and implementing large-scale controlled experiments to assess the effects of barred owl removal on spotted owl site occupancy, reproduction, and survival (USFWS 2011, p. III–65). The study would be conducted on from one to several study areas in western Washington, western Oregon, and northwestern California. The action alternatives vary by the number and location of study areas, the type of experimental design, duration of the study, and the method of barred owl removal.

Background

The Service listed the northern spotted owl as a threatened species under the Act in 1990, based primarily on habitat loss and degradation (55 FR 26114). As a result, conservation efforts for the northern spotted owl have been largely focused on habitat protection. While our listing rule noted that the long-term impact of barred owls on the spotted owl was of considerable concern, the scope and severity of this threat was largely unknown at that time (55 FR 26114, p. 26190). The Recovery Plan summarized information available since our listing rule and found that competition from barred owls now poses a significant and immediate threat to the northern spotted owl throughout its range (USFWS 2011, pp. B–10 through B–12).

Historically, the barred owl and northern spotted owl did not co-occur. In the past century, barred owls have expanded their range westward, reaching the range of the northern spotted owl in British Columbia by about 1959. Barred owl populations continue to expand southward within the range of the northern spotted owl, the population of barred owls behind the expansion-front continues to increase, and barred owls now outnumber spotted owls in many portions of the northern spotted owl's range (Pearson and Livezey 2003, p. 272).

There is strong evidence to indicate that barred owls are negatively affecting northern spotted owl populations. Barred owls displace spotted owls from high-quality habitat (Kelley *et al.* 2003, p. 51; Pearson and Livezey 2003, p. 274; Courtney *et al.,* pp. 7–27 through 7–31; Gremel 2005, pp. 9, 11, 17; Hamer *et al.* 2007, p. 764; Dugger *et al.* 2011, pp. 2464–1466), reducing their survival and reproduction (Olson *et al.* 2004, p. 1048; Anthony *et al.* 2006, p. 32; Forsman *et al.* 2011, pp. 41–43, 69–70). In addition, barred owls may physically attack spotted owls (Gutierrez *et al.* 2007, p. 187). These effects may help explain declines in northern spotted owl territory occupancy associated with barred owls in Oregon, and reduced northern spotted owl survivorship and sharp population declines in Washington (e.g., in northern Washington, spotted owl populations declined by as much as 55 percent between 1996 and 2006) (Anthony *et al.* 2006, pp. 21, 30, 32; Forsman *et al.* 2011, pp. 43–47, 65–66)). Without management intervention, it is reasonable to expect that competition from barred owls may cause extirpation of the northern spotted owl from all or a substantial portion of its historical range, reducing its potential for survival and recovery.

Public Involvement

On December 10, 2009, the Service published a notice of intent to prepare an environmental impact statement related to experimental removal of barred owls for the conservation benefit of threatened northern spotted owls (notice of intent) in the **Federal Register** (74 FR 65546), to solicit participation of: Federal, State, and local agencies; Tribes; and the public to determine the scope of the EIS and provide input on issues associated with the proposed experiment. In addition to the publication of the notice of intent, the scoping process included informal stakeholder and agency consultations, and electronic or mailed notification to over 1,000 interested parties. Public scoping lasted until January 11, 2010. A scoping report is appended to the Final EIS.

In accordance with the NEPA, the Draft EIS was circulated for public review and comment. The public review period was initiated with the publication of the notice of availability (NOA) in the **Federal Register** on March 8, 2012 (77 FR 14036). We conducted one public meeting in Seattle on May 3, 2012, and five informational webinars for the public. Comments were due June 6, 2012. A summary of the comments and written responses are appended to the Final EIS.

Alternatives

The alternatives vary by the number and location of study areas, the method of barred owl removal (lethal, or a combination of lethal and nonlethal), and the type of experimental design (demography vs. occupancy). All action alternatives are based on a simple treatment and control study approach. Under this approach, study areas are divided into two comparable segments. Barred owls are removed from the treatment area but not from the control area. Spotted owl populations are measured using the same methodology on both areas, and the population measures (occupancy, survival, reproduction, and population trend) are compared between the control and treatment areas.

The removal of barred owls under the experiment would occur over a period of 3 to 10 years, depending on the alternative. The action alternatives include from 1 to 11 study areas, including from 0.31 to 6.55 percent of the northern spotted owl's habitat. A brief description of each alternative follows.

Under the No-action Alternative, the Service would not conduct experimental removal of barred owls, thus not implementing one of the recovery actions set forth in the Recovery Plan (USFWS 2001, p. III–65). Data that would inform future barred owl management strategies would not be gathered.

Alternative 1 consists of a demography study in a single study area with existing pre-treatment spotted owl demography data. The study area would be located within an existing spotted owl demography study area where long-term monitoring of northern spotted owl populations has occurred (Lint *et al.* 1999, p. 17; Lint 2005, p. 7). Only lethal removal methods would be used in this alternative.

Alternative 2 consists of a demography study in three study areas, which would be located within existing spotted owl demography study areas and distributed across the range of the northern spotted owl. A combination of lethal and nonlethal removal methods would be used.

Alternative 3 consists of a demography study in two study areas. Barred owl removal would occur outside of existing spotted owl demography study areas, but within areas that have adequate data to conduct pre-removal demography analyses. A combination of lethal and nonlethal removal methods would be used.

Alternative 4 includes two subalternatives, 4a and 4b. Each subalternative consists of a demography study in two study areas outside existing spotted owl demography study areas. Each subalternative uses a combination of lethal and nonlethal removal methods. Subalternatives 4a and 4b differ in that 4a delays barred owl removal to collect pre-treatment data for comparison with treatment data, whereas 4b starts removal immediately and foregoes pre-treatment data collection.

Alternative 5 consists of an occupancy study approach in three study areas. Barred owl removal would occur on areas outside of existing spotted owl demography study areas. Only lethal removal methods would be applied in this alternative.

Alternative 6 includes two subalternatives, 6a and 6b. Each subalternative consists of an occupancy study in three study areas. Barred owl removal would occur on areas outside of existing spotted owl demography study areas. Each subalternative uses a combination of lethal and nonlethal removal methods. Subalternatives 6a and 6b differ in that 6a delays removal to collect pre-treatment data for comparison with treatment data, whereas 6b starts removal immediately and foregoes pre-treatment data collection.

Alternative 7 consists of a combination of demography and occupancy analyses across 11 study areas, some of which have current data. Three existing spotted owl demographic study areas would be included within these study areas. A combination of lethal and nonlethal removal methods would be used.

Following public review of the Draft EIS, the Service developed a Preferred Alternative based on a combination of the features of Alternatives 2 and 3. The Preferred Alternative consists of a demography study in four study areas as in both draft alternatives. Barred owl removal would occur on the Cle Elum Study Area in Washington and the Hoopa (Willow Creek) Study Area in California from Alternative 2, the Union/Myrtle (Klamath) Study Area in southern Oregon from Alternative 3, and one half of the combined Oregon Coast Ranges and Veneta Study Areas in northern Oregon. This last study area is a combination of study areas from Alternative 2 and 3. A combination of lethal and non-lethal removal methods would be used from Alternative 3.

References Cited

A complete list of references cited in this notice is available upon request from our Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

National Environmental Policy Act Compliance

We will make a decision no sooner than 30 days after the publication of the Final EIS. We anticipate issuing a Record of Decision in the summer of 2013.

We provide this notice under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and its implementing regulations in the Code of Federal Regulations (CFR) at 40 CFR 1506.6. We also publish this notice under authority of the Migratory Bird Treaty Act (16 U.S.C. 703–712) and its specific implementing regulations at 50 CFR 10.13 and 50 CFR 21.23.

Dated: July 17, 2013.

Robyn Thorson,

Regional Director, Pacific Region, U.S. Fish and Wildlife Service, Portland, Oregon.

[FR Doc. 2013–17620 Filed 7–23–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[134A2100DD/AAK300000/ a0t500000.000000]

Salt River Pima-Maricopa Indian Community—Amendment to Alcoholic Beverage Control Ordinance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the amendment to the Salt River Pima-Maricopa Indian Community Alcoholic Beverage Control Ordinance, Chapter 14, Salt River Pima-Maricopa Indian Community Code of Ordinances to provide consistency with newly amended Arizona State Liquor Law and to enact certain technical amendments. The amended Salt River Pima-Maricopa Indian Alcohol Beverage Control Ordinance, Chapter 14 of the Salt River Pima-Maricopa Indian Community Code of Ordinances was last published in the **Federal Register** on July 13, 2010 (Vol. 75, No 133, FR 39960–39967). Sections 14–5(c)(4), 14–9(g), 14–18(o) and (t) of the Salt River Pima-Maricopa Indian Community Code of Ordinances shall be repealed and replaced in their entirety, and a new Section 14–12 has been added.

DATES: *Effective Date:* This Amendment is effective 30 days after July 24, 2013.

FOR FURTHER INFORMATION CONTACT: Sharlot Johnson, Tribal Government Services Officer, Western Regional Office, Bureau of Indian Affairs, 2600 North Central Avenue, Phoenix, AZ 85004, Phone: (602) 379–6786; Fax: (602) 379–379–4100: or De Springer, Office of Indian Services, Bureau of Indian Affairs, 1849 C Street NW., MS–4513–MIB, Washington, DC 20240; Telephone (202) 513–7641.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian country. The Salt River Pima-Maricopa Indian Community adopted this amendment to the Salt River Pima-Maricopa Indian Alcohol Beverage Control Ordinance, Chapter 14 of the Salt River Pima-Maricopa Indian Community Code of Ordinances by Ordinance Number: SRO–410–2013 on December 5, 2012.

This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs. I certify that the Community Council duly adopted this amendment to the Salt River Pima-Maricopa Indian Alcohol Beverage Control Ordinance, Chapter 14 of the Salt River Pima-Maricopa Indian Community Code of Ordinances on December 5, 2012.

Dated: July 17, 2013.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

The amendment to the Salt River Pima-Maricopa Indian Alcohol Beverage Control Ordinance, Chapter 14 of the Salt River Pima-Maricopa Indian Community Code of Ordinances reads as follows:

Sections 14–5(c)(4), 14–9(g), 14–18(o) and (t) of the Salt River Pima-Maricopa Indian Community Code of Ordinances shall be repealed and replaced in their entirety with the following, and a new Section 14–12 shall added:

Sec. 14–5(c)(4)

4. The office or the Salt River Police Department may cite a Licensee to appear before the office or the hearing officer for a hearing upon allegations of violations of articles II and III or any relevant law or regulation issued pursuant to this chapter 14.

Sec. 14–9(g)

In lieu of or in addition to any suspension, revocation or refusal to renew a license, the director may impose a civil penalty of not less than two hundred dollars ($200.00) and no more than three thousand dollars ($3,000.00) for each violation and/or require the licensee and its employees to attend certain training.

Sec. 14–12. Coordination With the Salt River Police Department

In order to effectively enforce the regulatory and law enforcement provisions of this chapter, any report of violence or disorderly conduct occurring at an licensed premises that is received by either the office or the Salt River Police Department shall be immediately reported by the receiving department to the other department. In addition to the reporting of the incident, the department receiving the report of violence or disorderly conduct shall also share any relevant information with the other department unless the sharing of such information is prohibited by Community law or policy.

Sec. 14–18

(o) It shall be unlawful for an on-sale retailer or employee of the licensee to conduct drinking contests, to sell or deliver to a person an unlimited number of alcoholic beverages during any set period of time for a fixed price, to deliver more than forty (40) ounces of beer, one (1) liter of wine or four (4) ounces of distilled spirits in any alcoholic beverage drink to one person at one time for that person's consumption or to advertise any practice prohibited by this paragraph.

(t) It shall be unlawful for a licensee or an employee of the licensee to fail or refuse to make the licensed premises or records available for inspection and examination or as to comply with a lawful subpoena issued under this chapter.

[FR Doc. 2013–17741 Filed 7–23–13; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNML00000 L12200000.DF0000]

Notice of Public Meeting, Las Cruces District Resource Advisory Council Meeting, New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act, the Bureau of Land Management's (BLM) Las Cruces District Resource Advisory Council (RAC) will meet as indicated below.

DATES: The RAC will meet on August 22, 2013, at the BLM Las Cruces District Office Main Conference Room from 9 a.m.–4 p.m. The public may send written comments to the RAC at the BLM Las Cruces District Office, 1800 Marquess Street, Las Cruces, NM 88005.

FOR FURTHER INFORMATION CONTACT: Rena Gutierrez, BLM Las Cruces District, 1800 Marquess Street, Las Cruces, NM, 88005, 575–525–4338. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8229 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The 10-member Las Cruces District RAC advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in New Mexico. Planned agenda items include opening remarks from the BLM Las Cruces District Manager, updates on ongoing issues and planning efforts, presentation on the TriCounty Resource Management Plan/Environmental Impact Statement, and discussions related to fuel treatments and the wildland fire program, target shooting, and an update on access issues. A half-hour public comment period during which the public may address the RAC will begin at 3 p.m. All RAC meetings are open to the public. Depending on the number of individuals wishing to comment and time available, the time for individual oral comments may be limited.

David L. Wallace,

Acting District Manager, Las Cruces.

[FR Doc. 2013–17779 Filed 7–23–13; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY910000 L16100000 XX0000]

Notice of Public Meeting; Wyoming Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Wyoming Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meeting will be held August 21, 2013, (1:30 p.m. to 5:00 p.m.), August 22, (8:00 a.m. to 5:00 p.m.) and August 23, (8:00 a.m. to noon) 2013.

ADDRESSES: The meeting will be at the Buffalo Field Office, 1425 Fort Street, Buffalo, Wyoming.

FOR FURTHER INFORMATION CONTACT: Cindy Wertz, Wyoming Resource Advisory Council Coordinator, Wyoming State Office, 5353 Yellowstone, Cheyenne, WY 82009; telephone 307–775–6014; email *cwertz@blm.gov.*

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: This 10-member RAC advises the Secretary of the Interior on a variety of management issues associated with public land management in Wyoming.

Planned agenda topics include discussions on uranium, cultural, NEPA cooperating agency issues, recreation, land acquisitions and follow-up to previous meetings.

On Wednesday, August 21, the meeting will begin at 1:00 p.m. at the Buffalo Field Office. On Thursday, August 22 at 2:45 p.m., there will be a field tour of Welch Ranch. The public may attend the field tour portion of the agenda, but must provide their own transportation. High clearance vehicles are recommended.

All RAC meetings are open to the public with time allocated for hearing public comments. On Friday, August 23, there will be public comment period beginning at 8:00 a.m. The public may also submit written comments to the RAC. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. If there are no members of the public interested in speaking, the meeting will move promptly to the next agenda item.

Donald A. Simpson,

State Director.

[FR Doc. 2013–17763 Filed 7–23–13; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[13X.LLAZ956000.L14200000.BJ0000.241A]

Notice of Filing of Plats of Survey; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats of Survey; Arizona.

SUMMARY: The plats of survey of the described lands were officially filed in the Arizona State Office, Bureau of Land Management, Phoenix, Arizona, on dates indicated.

SUPPLEMENTARY INFORMATION:

The Gila and Salt River Meridian, Arizona

The plat representing the survey of a portion of the Ninth Standard Parallel North (south boundary), a portion of the north boundary, a portion of the subdivisional lines and the subdivision of certain sections, Township 37 North, Range 7 East, accepted June 19, 2013, and officially filed June 21, 2013, for Group 1107, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat representing the subdivision of certain sections, Township 34 North, Range 8 East, accepted May 9, 2013, and officially filed May 10, 2013, for Group 1107, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat representing the subdivision of certain sections, Township 35 North, Range 8 East, accepted May 9, 2013, and officially filed May 10, 2013, for Group 1107, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat representing the dependent resurvey of a portion of the south boundary, the survey of a portion of the north boundary, a portion of the subdivisional lines and the subdivision of certain sections, Township 30 North, Range 9 East, accepted May 31, 2013, and officially filed June 4, 2013, for Group 1107, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat representing the survey of portions of the east and north boundaries, a portion of the subdivisional lines and the subdivision of certain sections, Township 31 North, Range 9 East, accepted May 31, 2013, and officially filed June 4, 2013, for Group 1107, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat representing the survey of a portion of the subdivisional lines and the subdivision of certain sections, Township 32 North, Range 9 East, accepted May 9, 2013, and officially filed May 10, 2013, for Group 1107, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat representing the survey of a portion of the north boundary, portions of the subdivisional lines and the subdivision of certain sections, Township 33 North, Range 9 East, accepted May 9, 2013, and officially filed May 10, 2013, for Group 1107, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat representing the survey of a portion of the north boundary, portions of the subdivisional lines and the subdivision of sections 32 and 33, Township 33½ North, Range 9 East, accepted May 9, 2013, and officially filed May 10, 2013, for Group 1107, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat representing the survey of a portion of the south boundary, portions of the subdivisional lines and the subdivision of sections 30, 31 and 32, Township 34 North, Range 9 East, accepted May 9, 2013, and officially filed May 10, 2013, for Group 1107, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat representing the survey of the Ninth Standard Parallel North (south boundary), the west and north boundaries, the subdivisional lines and the subdivision of certain sections, Township 37 North, Range 11 East, accepted April 22, 2013, and officially filed April 24, 2013, for Group 1105, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat representing the establishment of the northeast township corner, the survey of the west boundary, a portion of the north boundary, a portion of the subdivisional lines and the subdivision of certain sections, Township 38 North, Range 11 East, accepted April 22, 2013, and officially filed April 24, 2013, for Group 1106, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat (in 6 sheets) representing the dependent resurvey of a portion of the south and east boundaries, a portion of the subdivisional lines and portions of certain mineral surveys, Township 18 South, Range 15 East, accepted April 5, 2013, and officially filed April 9, 2013, for Group 1101, Arizona.

This plat was prepared at the request of the United States Forest Service.

The plat representing the dependent resurvey of a portion of the east boundary, a portion of the subdivisional lines and portions of Mineral Survey Numbers 1299, 1301 and 1302, Township 19 South, Range 15 East, accepted April 5, 2013, and officially filed April 9, 2013, for Group 1101, Arizona.

This plat was prepared at the request of the United States Forest Service.

The plat (in 4 sheets) representing the dependent resurvey of a portion of the subdivisional lines and portions of certain mineral surveys, Township 18 South, Range 16 East, accepted April 5, 2013, and officially filed April 9, 2013, for Group 1101, Arizona.

This plat was prepared at the request of the United States Forest Service.

The plat representing the dependent resurvey of a portion of the north boundary and a portion of the subdivisional lines, Township 19 South, Range 16 East, accepted April 5, 2013, and officially filed April 9, 2013, for Group 1101, Arizona.

This plat was prepared at the request of the United States Forest Service.

A person or party who wishes to protest against any of these surveys must file a written protest with the Arizona State Director, Bureau of Land Management, stating that they wish to protest.

A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within thirty (30) days after the protest is filed.

FOR FURTHER INFORMATION CONTACT: These plats will be available for inspection in the Arizona State Office, Bureau of Land Management, One North Central Avenue, Suite 800, Phoenix, Arizona, 85004–4427. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

Stephen K. Hansen,

Chief Cadastral Surveyor of Arizona.

[FR Doc. 2013–17777 Filed 7–23–13; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–SER–FOPU–13218; PX.P0072916D.00.1]

Final General Management Plan, Final Wilderness Study, and Final Environmental Impact Statement, Fort Pulaski National Monument, Georgia

AGENCY: National Park Service, Interior.

ACTION: Notice of Availability.

SUMMARY: Pursuant to Section 102 (2) (C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service (NPS) announces the availability of a Final Environmental Impact Statement for the General Management Plan and Wilderness Study (Final EIS/GMP/WS) for Fort Pulaski National Monument (national monument), Georgia. Consistent with NPS laws, regulations, and policies and the purpose of the national monument, the Final EIS/GMP/WS will guide the management of the national monument over the next 20+ years.

DATES: The NPS will execute a Record of Decision (ROD) no sooner than 30 days following publication of the Environmental Protection Agency's Notice of Availability of the Final EIS/GMP/WS in the **Federal Register**.

ADDRESSES: Electronic copies of the Final EIS/GMP/WS will be available online at *http://parkplanning.nps.gov/FOPU*. To request a copy, contact David Libman, National Park Service, 100 Alabama Street, 1924 Building, Atlanta, Georgia 30303; telephone (404) 507–5701. A limited number of compact disks and printed copies of the Final EIS/GMP/WS will be made available at Fort Pulaski National Monument Headquarters, Cockspur Island, US Highway 80 East, Savannah, Georgia 31410–0757.

FOR FURTHER INFORMATION CONTACT: David Libman, National Park Service, 100 Alabama Street, 1924 Building, Atlanta, Georgia 30303; telephone (404) 507–5701.

SUPPLEMENTARY INFORMATION: The Final EIS/GMP/WS responds to, and incorporates agency and public comments received on the Draft EIS, which was available for public review from May 11, 2012, through July 9, 2012. Two public meetings were held on June 13, 2012, and June 14, 2012, and a total of 29 comments were received. The NPS responses to substantive agency and public comments are provided in Chapter 5, Consultation and Coordination section, of the Final EIS/GMP/WS.

The Final EIS/GMP/WS evaluates three alternatives for managing use and development of the national monument:

- Alternative A, the No Action alternative represents the continuation of current management action and direction into the future.
- Alternative B, the NPS preferred alternative, focuses management of the national monument on the April 1862 period of significance in terms of the landscape and interpretive programs. This alternative would emphasize the restoration, preservation, and interpretation of historic landscapes and viewsheds of the site for the purpose of providing visitors a greater understanding of the siege and reduction of Fort Pulaski in 1862.
- Alternative C which focuses management on a broader interpretive mandate than Alternative B. Alternative C would include a wider range of themes and historic periods as well as natural resource themes.

When approved, the plan will guide the management of the national monument over the next 20+ years.

The responsible official for this Final EIS/GMP/WS is the Regional Director, NPS Southeast Region, 100 Alabama Street SW., 1924 Building, Atlanta, Georgia 30303.

Dated: July 11, 2013.

Gordon Wissinger,

Acting Regional Director, Southeast Region.

[FR Doc. 2013–17793 Filed 7–23–13; 8:45 am]

BILLING CODE 4310–JD–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–13404; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Washington State Parks and Recreation Commission, Olympia, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Washington State Parks and Recreation Commission has completed an inventory of human remains in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Washington State Parks and Recreation Commission. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Washington State Parks and Recreation Commission at the address in this notice by August 23, 2013.

ADDRESSES: Alicia Woods, Washington State Parks and Recreation Commission, PO Box 42650, Olympia, WA 98504–2650, telephone (360) 902–0939, email *Alicia.Woods@parks.wa.gov.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the control of the Washington State Parks and Recreation Commission, Olympia, WA, and in the physical custody of the Burke Museum of Natural History and Culture, University of Washington (Burke Museum), Seattle, WA. The human remains were removed from Sucia Island State Park, San Juan County, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Washington State Parks and Recreation Commission and the Burke Museum professional staff in consultation with representatives of the Lummi Tribe of the Lummi Reservation; Samish Indian Nation (previously listed as the Samish Indian Tribe, Washington); and the Swinomish Indians of the Swinomish Reservation of Washington.

History and Description of the Remains

In August 1960, human remains representing, at minimum, one individual were removed by Robert Kidd, a student working under the supervision of R. E. Greengo, of the Department of Anthropology, University of Washington, during the excavation of site 45–SJ–105 on Sucia Island. Kidd does not indicate the discovery of a burial site or human remains in his report, but Kidd specifically notes Sucia Island as ''historic Lummi territory.'' Staff at the Burke Museum identified the remains in unmodified level bags in the collection prior to 1996. Washington State Parks and Recreation Commission believes Kidd inadvertently and unknowingly removed these human remains from the site. No known individuals were identified. No associated funerary objects are present.

In July 1971, human remains representing, at minimum, two individuals were removed by a park visitor who inadvertently discovered a burial on Sucia Island at site 45–SJ–306. The remains were exposed by natural erosion. The San Juan County Sheriff's Department sent the remains to the Department of Anthropology, University of Idaho, Moscow, ID, for identification. Prior to 1993, this collection was released back into the custody of Washington State Parks and Recreation Commission. Anthropologists that reviewed the human remains indicated there was an extended postmortem interval and the human remains are consistent with archaeological material. No known individuals were identified. No associated funerary objects are present.

Ethnographic and archaeological evidence suggests Native American groups, specifically the Lummi people, occupied Sucia Island prior to European contact (Amos 1978; McDonald 1990; Stern 1934, Stolpe 1972, Suttles 1951, 1954, 1990). The Lummi Tribal Historic Preservation Officer confirmed Sucia Island as one among many islands in the San Juan archipelago that was occupied by the Lummi people prior to and during the early stages of European contact and settlement in the area. Washington State Parks and Recreation Commission staff believes there is sufficient evidence Sucia Island was occupied by Native Americans, specifically the Lummi people, and has determine there is a relationship of shared group identity between the Native American human remains and the Lummi Tribe of the Lummi Reservation.

Determinations Made by the Washington State Parks and Recreation Commission

Officials of the Washington State Parks and Recreation Commission have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of a minimum of three individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Lummi Tribe of the Lummi Reservation.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Alicia Woods, Washington State Parks and Recreation Commission, PO Box 42650, Olympia, WA 98504–2650, telephone (360) 902–0939, email *Alicia.Woods@parks.wa.gov.* After that date, if no additional requestors have come forward, transfer of control of the human remains to Lummi Tribe of the Lummi Reservation may proceed.

The Washington State Parks and Recreation Commission is responsible for notifying the Lummi Tribe of the Lummi Reservation; Samish Indian Nation (previously listed as the Samish Indian Tribe, Washington); and the Swinomish Indians of the Swinomish

Reservation of Washington that this notice has been published.

Dated: June 27, 2013.

Melanie O'Brien,

Acting Manager, National NAGPRA Program.

[FR Doc. 2013–17717 Filed 7–23–13; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–13405; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Washington State Parks and Recreation Commission, Olympia, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Washington State Parks and Recreation Commission has completed an inventory of human remains, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Washington State Parks and Recreation Commission. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Washington State Parks and Recreation Commission at the address in this notice by August 23, 2013.

ADDRESSES: Alicia Woods, Washington State Parks and Recreation Commission, PO Box 42650, Olympia, WA 98504–2650, telephone (360) 902–0939, email *Alicia.Woods@parks.wa.gov*.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the Washington State Parks and Recreation Commission, Olympia, WA. The human remains were removed from Birch Bay State Park, Whatcom County, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Washington State Parks and Recreation Commission professional staff in consultation with representatives of the Lummi Tribe of the Lummi Reservation. The following additional tribes were contacted but did not participate in the consultation and deferred to the Lummi Tribe of the Lummi Reservation: Nooksack Indian Tribe and Upper Skagit Indian Tribe.

History and Description of the Remains

On May 13, 1999, human remains representing, at minimum, one individual were removed from a recorded site in Whatcom County, WA. During the monitoring of an expansion of the parking lot inside Birch Bay State Park boundaries, fragments of bone were inadvertently discovered. At the time, these fragments were believed to be faunal. The fragments were subsequently delivered to Washington State Parks and Recreation Commission headquarters and stored in collections. In 2001, the fragments were reviewed by an anthropologist and were determined to be human remains and to be consistent with an extended postmortem interval, but no cultural, gender, or age specific characteristics could be determined. No known individuals were identified. No associated funerary objects are present.

The site is a known prehistoric archaeological site that consists of material from Native American permanent and seasonal villages, occupied predominantly by the Semiahmoo, Lummi, and Nooksack people until the time of European settlement in the 1870s. The age of the site is dated to a minimum of 2,000 years ago and numerous burials have been excavated from within and below a shell midden on this site. Because of the location from which the human remains were removed and the condition of the human remains, Washington State Parks and Recreation Commission staff has determined that the human remains are of Native American descent. A representative from the Lummi Tribe, in consultation, confirmed the Lummi people occupied and utilized the area of Birch Bay. Additionally, ethnographic (Jeffcot, 1945; Suttles, 1990; Tremaine, 1975) and archaeological evidence (Baldwin, 2008 and 2010; Gaston & Grabert, 1975; Grabert & Spear, 1976; Reid, 1996) supports on a relationship of shared group identity between the human remains and the Lummi Tribe of the Lummi Reservation and the Nooksack Indian Tribe.

Determinations Made by the Washington State Parks and Recreation Commission

Officials of the Washington State Parks and Recreation Commission have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Lummi Tribe of the Lummi Reservation and the Nooksack Indian Tribe.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Alicia Woods, Washington State Parks and Recreation Commission, PO Box 42650, Olympia, WA 98504–2650, telephone (360) 902–0939, email *Alicia.Woods@parks.wa.gov* by August 23, 2013. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Lummi Tribe of the Lummi Reservation may proceed. The Nooksack Indian Tribe has deferred transfer of control to the Lummi Tribe of the Lummi Reservation.

The Washington State Parks and Recreation Commission is responsible for notifying the Lummi Tribe of the Lummi Reservation; Nooksack Indian Tribe; and the Upper Skagit Indian Tribe that this notice has been published.

Dated: June 27, 2013.

Melanie O'Brien,

Acting Manager, National NAGPRA Program.

[FR Doc. 2013–17713 Filed 7–23–13; 8:45 am]

BILLING CODE 4310–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–13407; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Thomas Burke Memorial Washington State Museum, University of Washington, Seattle, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Thomas Burke Memorial Washington State Museum, University of Washington (Burke Museum), has completed an inventory of human remains and associated funerary objects in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Burke Museum. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Burke Museum at the address in this notice by August 23, 2013.

ADDRESSES: Peter Lape, Burke Museum, University of Washington, Box 35101, Seattle, WA 98195, telephone (206) 685–3849, email *plape@uw.edu*.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the Burke Museum. The human remains and associated funerary objects were most likely removed from the upper Columbia River Plateau, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains and associated funerary objects was made by the Burke Museum professional staff in consultation with representatives of the Confederated Tribes and Bands of the Yakama Nation; Confederated Tribes of the Colville Reservation; Confederated Tribes of the Umatilla Indian Reservation (previously listed as the Confederated Tribes of the Umatilla Reservation, Oregon); Confederated Tribes of the Warm Springs Reservation of Oregon; Nez Perce Tribe (previously listed as the Nez Perce Tribe of Idaho); and the Wanapum Band, a non-federally recognized Indian group (hereafter referred to as ''The Tribes and The Indian Group'').

History and Description of the Remains

At an unknown date, human remains representing, at minimum, one individual were most likely removed from the upper Columbia River Plateau, WA. The human remains and associated funerary objects were found in an unlabeled bag in the Burke Museum's Ethnology collection in 1996. No known individuals were identified. The one associated funerary object is a bag containing copper fragments (including rolled copper, thin hammered fragments, beads, buttons, a necklace and blanket pin, melted glass beads, and one projectile point).

The associated funerary objects described in this notice are consistent with burial materials found in archaeological sites in Benton and Grant Counties, WA. The human remains in this notice have been determined to be Native American based on archaeological evidence.

Early and late published ethnographic documentation indicates that the upper Columbia River Plateau was the aboriginal territory of the Moses-Columbia or Sinkiuse, and the Yakima (Daugherty 1973, Miller 1998, Mooney 1896, Ray 1936, Spier 1936) whose descendants are represented today by the Confederated Tribes of the Colville Reservation and the Confederated Tribes and Bands of the Yakama Nation. Furthermore, information provided by the tribes during consultation indicates that the aboriginal ancestors occupying this area were highly mobile and traveled the landscape for gathering resources as well as trade. Descendants of these Plateau communities are now widely dispersed and enrolled as members of The Tribes and The Indian Group.

Determinations Made by the Burke Museum

Officials of the Burke Museum have determined that:

- Based on archaeological evidence, the human remains have been determined to be Native American.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the one object described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and The Tribes and The Indian Group.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Peter Lape, Burke Museum, University of Washington, Box 35101, Seattle, WA 98195, telephone (206) 685–3849, email *plape@uw.edu,* by August 23, 2013. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects The Tribes and The Indian Group (if joined) may proceed.

The Burke Museum is responsible for notifying The Tribes and The Indian Group that this notice has been published.

Dated: June 27, 2013.

Melanie O'Brien,

Acting Manager, National NAGPRA Program.

[FR Doc. 2013–17714 Filed 7–23–13; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–13408; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: State Historical Society of Wisconsin, Madison, WI

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The State Historical Society of Wisconsin has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any present-day Indian tribes or Native Hawaiian organizations. Representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the State Historical Society of Wisconsin. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the Indian tribes or Native Hawaiian organizations stated in this notice may proceed.

DATES: Representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the State Historical Society of Wisconsin at the address in this notice by August 23, 2013.

ADDRESSES: Jennifer Kolb, Wisconsin Historical Museum, 30 North Carroll Street, Madison, WI 53703, telephone (608) 261–2461, email *Jennifer.Kolb@wisconsinhistory.org*.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the State Historical Society of Wisconsin, Madison, WI. The human remains and associated funerary objects were removed from Waupaca County, WI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the State Historical Society of Wisconsin professional staff in consultation with representatives of the Forest County Potawatomi Community, Wisconsin; Ho-Chunk Nation of Wisconsin; and the Menominee Indian Tribe of Wisconsin.

History and Description of the Remains

In1963, human remains representing, at minimum, one individual were removed from a burial located just below the plow zone at Riverbend 1 Site in Waupaca County, WI. The fragmentary human remains were excavated by the State Historical Society of Wisconsin and the Wisconsin Department of Transportation. As the burial had been partially disturbed by plowing, some of the remains were recovered during a surface survey prior to the excavation. The human remains were determined to be those of an adult Native American female. No known individuals were identified. The two associated funerary objects are a quartz shatter and a quartzite flake.

Determinations Made by the State Historical Society of Wisconsin

Officials of the State Historical Society of Wisconsin have determined that:

• Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on skeletal analysis.

• Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.

• Treaties, Acts of Congress, or Executive Orders, indicate that the land from which the Native American human remains were removed is the aboriginal land of the Menominee Indian Tribe of Wisconsin.

• Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains may be to the Menominee Indian Tribe of Wisconsin.

Additional Requestors and Disposition

Representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Jennifer Kolb, Wisconsin Historical Museum, 30 North Carroll Street, Madison, WI 53703, telephone (608) 261–2461, email *Jennifer.Kolb@wisconsinhistory.org*, by August 23, 2013. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Menominee Tribe of Wisconsin may proceed.

The State Historical Society of Wisconsin is responsible for notifying the Forest County Potawatomi Community, Wisconsin; Ho-Chunk Nation of Wisconsin; and the Menominee Tribe of Wisconsin that this notice has been published.

Dated: June 27, 2013.

Melanie O'Brien,

Acting Manager, National NAGPRA Program.

[FR Doc. 2013–17716 Filed 7–23–13; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–PWR–YOSE–13178; PS.SPWLA0028.00.1]

Minor Boundary Revision at Yosemite National Park

AGENCY: National Park Service, Interior.

ACTION: Notification of Boundary Revision.

SUMMARY: The boundary of Yosemite National Park is modified to include 80 acres of land. Fee simple interest in the land will be donated to the United States. The land is located in Mariposa County, California, immediately adjacent to the current western boundary of Yosemite National Park.

DATES: The effective date of this boundary revision is July 24, 2013.

ADDRESSES: The map depicting this boundary revision is available for inspection at the following locations: National Park Service, Land Resources Program Center, Pacific West Region, 333 Bush Street, Suite 500, San Francisco, California 94104, and National Park Service, Department of the Interior, 1849 C Street NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Chief Realty Officer Greg Gress, National Park Service, Land Resources Program Center, Pacific West Region, Suite 500, San Francisco, California 94104, telephone (415) 623–2120.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 16 U.S.C. § 460*l*–9(c)(1), the boundary of Yosemite National Park is modified to include 80 acres of land identified as Tract 02–132, tax parcel number 006–070–010. Fee simple interest in the land will be donated to the United States. The land is located in Mariposa County, California, immediately adjacent to the current western boundary of Yosemite National Park. The boundary revision is depicted on Map No. 104/116,367 dated August 2012.

16 U.S.C. 460*l*–9(c)(1) provides that, after notifying the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources, the Secretary of the Interior is authorized to make this boundary revision upon publication of notice in the **Federal Register**. The Committees have been notified of this boundary revision. The inclusion and acquisition of this property will enable the National Park Service to better protect significant forest habitat while providing additional educational and recreational opportunities for visitors to the park.

Dated: June 7, 2013.

Christine S. Lehnertz,

Regional Director, Pacific West Region.

[FR Doc. 2013–17792 Filed 7–23–13; 8:45 am]

BILLING CODE 4312–FF–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–PWR–PWRO–12506; PPPWNOCAN0—PPMRSNR1Z.y00000]

Notice of Approval of Record of Decision for Stehekin River Corridor Implementation Plan, Lake Chelan National Recreation Area, North Cascades National Park Service Complex, Washington

AGENCY: National Park Service, Interior.

ACTION: Notice of Record of Decision.

SUMMARY: Pursuant to § 102(2)(C) of the National Environmental Policy Act of 1969 (Pub. L. 91–190, as amended) and the regulations promulgated by the Council on Environmental Quality (40 CFR part 1505.2), the Department of the Interior, National Park Service (NPS), in collaboration with the Federal Highway Administration, prepared the Final Environmental Impact Statement (Final EIS) for the Stehekin River Corridor Implementation Plan (CIP). The requisite no-action ''wait period'' was initiated on October 12, 2012, with the Environmental Protection Agency's **Federal Register** notice of the filing of the Final EIS.

Decision: The NPS has selected Alternative 5, identified as ''preferred'' in the Final EIS, and will implement it as the approved Stehekin River CIP. The CIP will allow water from large floods to occupy more of the floodplain (within the channel migration zone), thereby reducing flooding severity in any one location. Also included in the approved CIP is the relocation of approximately two miles of the Stehekin Valley Road, removal of park facilities out of the floodplain, improvements in recreational trail and camping opportunities, and revision of the park's Land Protection Plan criteria used to determine willing owner land exchange and acquisition priorities (based on threats to the most vulnerable areas).

Four other alternatives were evaluated, the full range of foreseeable environmental consequences was assessed, and appropriate mitigation measures were identified. The selected alternative was deemed to be the ''environmentally preferred'' course of action.

Interested parties desiring to review the Record of Decision may obtain a copy by contacting the Superintendent, North Cascades National Park Service Complex, 810 State Route 20, Sedro-Woolley, WA 94123 or via telephone request at (360) 854–7200.

Dated: March 14, 2013.

Christine S. Lehnertz,

Regional Director, Pacific West Region.

[FR Doc. 2013–17781 Filed 7–23–13; 8:45 am]

BILLING CODE 4312–FF–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX066A000 67F 134S180110; S2D2S SS08011000 SX066A00 33F 13xs501520]

Notice of Proposed Information Collection

AGENCY: Office of Surface Mining Reclamation and Enforcement, Department of the Interior.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request renewed approval from the Office of Management and Budget (OMB) to continue the collection of information for the Revisions; Renewals; and Transfer, Assignment, or Sale of Permit Rights.

DATES: Comments on the proposed information collection must be received by September 23, 2013, to be assured of consideration.

ADDRESSES: Comments may be mailed to John Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave. NW., Room 203–SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov* or by fax to (202) 219–3276.

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection request contact John Trelease, at (202) 208–2783 or by email to *jtrelease@osmre.gov*.

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. This notice identifies an information collection that OSM will be submitting to OMB for renewal. The collection is contained in 30 CFR Part 774—Revision; Renewal; and Transfer, Assignment, or Sale of Permit Rights.

OSM has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on reestimates of burden or respondents. OSM will request a 3-year term of approval for this information collection activity.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will be included in OSM's submission of the information collection request to OMB.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

This notice provides the public with 60 days in which to comment on the following information collection activity:

Title: 30 CFR Part 774—Revisions; Renewals; and Transfer, Assignment, or Sale of Permit Rights.

OMB Control Number: 1029–0116.

Summary: Sections 506 and 511 of Public Law 95–87 provide that persons seeking permit revisions; renewals; or transfer, assignment, or sale of their permit rights for coal mining activities submit relevant information to the regulatory authority to allow the regulatory authority to determine whether the applicant meets the requirements for the action anticipated.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: Surface coal mining permit applicants and State regulatory authorities.

Total Annual Responses: 3,510 responses from permit applicants and 3,343 responses from State regulatory authorities.

Total Annual Burden Hours: 242,179.

Total Annual Non-wage Costs: $902,920.

Dated: July 18, 2013.

Andrew F. DeVito,

Chief, Division of Regulatory Support.

[FR Doc. 2013–17829 Filed 7–23–13; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act, the Resource Conservation and Recovery Act, and the Clean Water Act

On July 18, 2013, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Southern District of Illinois in the lawsuit entitled *United States* v. *Chemetco, Inc.,* Civil Action Nos. 00–670 and 00–677. The United States and the State of Illinois (the ''State'') are plaintiffs in that consolidated environmental enforcement action concerning the Chemetco Superfund Site in Hartford, Illinois (the ''Chemetco Site'' or the ''Site''). The United States and the State also are co-signatories to the proposed Consent Decree with the Chapter 7 Bankruptcy Estate of Chemetco, Inc. (the ''Estate''), as represented by the Chapter 7 Trustee for the Estate, and Paradigm Minerals and Environmental Services LLC (''Paradigm'').

The proposed Consent Decree would regulate the sale and reprocessing of slag and other metal-bearing materials at the Chemetco Site under an Asset Purchase and Processing Agreement between the Estate and Paradigm (the ''Processing Agreement''). Work under that Processing Agreement—which was approved by a set of Bankruptcy Court Orders—would decrease the volume of material that needs to be contained or remediated as a waste, thereby reducing the potential cost of any final remedy for the Chemetco Site under the Comprehensive Environmental Response, Compensation, and Liability Act. The Processing Agreement also requires that a fixed portion of the revenue from the reprocessing operation be deposited in a specially-established environmental escrow account and used for remediation of the Site. The Consent Decree would require that the work at the Site by Paradigm and the Estate conform to a detailed set of EPA-approved work plans appended to the Decree. The Decree also requires Paradigm to post financial assurance as backing for its commitment to assure the clean closure of the reprocessing area after its work is completed. All EPA costs of overseeing the sale and reprocessing activities would be reimbursed under the settlement.

In addition, the proposed Consent Decree would resolve claims against the Estate under the Resource Conservation and Recovery Act (''RCRA'') and the Clean Water Act in exchange for: (i) $471,000 to be transferred from a RCRA Financial Assurance Trust Fund established by Chemetco to a Superfund Special Account that can be used to fund cleanup work at the Site; (ii) a $500,000 allowed claim for civil penalties against the Estate; and (iii) conditions limiting the sale of a parking lot area that was created by filling a portion of a wetland with slag.

The publication of this notice opens a period for public comment on the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Chemetco, Inc.,* D.J. Ref. No. 90–5–1–1–4516. 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 email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General U.S. DOJ–ENRD, P.O. Box 7611, Washington, DC 20044–7611.

The United States also intends to hold a public meeting on the proposed Consent Decree pursuant to section 7003(d) of RCRA. The meeting will be held at 6:30 p.m. on August 6, 2013, at the Hartford Community Center, located at 715 N. Delmar Avenue in Hartford, Illinois.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* 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 $147.25 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without the exhibits, the cost is $28.50.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–17735 Filed 7–23–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On June 26, 2013, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Southern District of Illinois in the lawsuit entitled *United States, et al.* v. *Gateway Energy & Coke Company, et al.,* Civil Action No. 3:13–cv–00616–DRH–SCW.

The United States, on behalf of the U.S. Environmental Protection Agency, has filed a complaint under the Clean Air Act asserting claims relating to two Midwestern heat recovery coking facilities, one of which is located in Granite City, Illinois (the ''Gateway Facility''), and the other of which is located in Franklin Furnace, Ohio (the ''Haverhill Facility''). The United States seeks civil penalties and injunctive relief against the owners and operators of the Gateway and Haverhill Facilities. The Haverhill Coke Company, LLC, formerly known as the Haverhill North Coke Company, is an owner and operator of the Haverhill Facility along with SunCoke Energy, Inc. (''SunCoke'') (together ''the Haverhill Defendants''). The Gateway Energy & Coke Company, LLC is an owner and operator of the Gateway Facility along with SunCoke (together ''the Gateway Defendants'').

The States of Illinois and Ohio are co-plaintiffs in this action. The State of Illinois asserts claims in this action relating to the Gateway Facility under the Illinois Environmental Protection

Act (''Illinois Act''), 415 ILCS 5/1 *et seq.* (2010), and seeks injunctive relief and civil penalties against the Gateway Defendants for violations of the Illinois Act. The State of Ohio asserts claims in this action relating to the Haverhill Facility under Chapter 3745 of the Ohio Revised Code (''ORC''), and the rules adopted thereunder, and seeks injunctive relief and civil penalties against the Haverhill Defendants for violations of ORC Chapter 3704. The Complaint alleges that the Gateway Defendants operated the Gateway Facility and the Haverhill Defendants operated the Haverhill Facility in excess of bypass venting limits specified in their Prevention of Significant Deterioration permits, and that the Haverhill Defendants failed to comply with emissions monitoring and reporting requirements.

The Consent Decree would require (1) installation of process equipment to provide redundancy that will allow hot coking gases to be routed to a pollution control device instead of vented directly to the atmosphere in the event of equipment downtime; (2) installation of continuous emissions monitoring systems for sulfur dioxide, at one bypass vent per process unit (two at the Haverhill Facility and one at the Gateway Facility); (3) payment of a civil penalty of $1.995 million, of which $1.27 million will go to the United States, $575,000 to the State of Illinois, and $150,000 to the State of Ohio; and (4) performance of a lead hazard abatement supplemental environmental project at a cost of $255,000 at the Gateway Facility.

In a **Federal Register** Notice published on July 2, 2013, the Department of Justice announced its intention to receive comments relating to the Consent Decree for a period of thirty (30) days from the date of that publication. 78 FR 39770 (July 2, 2013). In response to a request, the Department of Justice is extending that public comment period for thirty (30) days, until September 3, 2013. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States, et al.* v. *Gateway Energy & Coke Company, et al.,* D.J. Ref. Nos. 90–5–2–1–09890 and 90–5–2–1–10065. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*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.usdoj.gov/enrd/Consent_Decrees.html.* 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 $29.75 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without the exhibits and signature pages, the cost is $16.25.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–17734 Filed 7–23–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Water Act

On July 15, 2013, the Department of Justice lodged a proposed consent decree with the United States District Court for the Western District of Arkansas in the lawsuit entitled *United States* v. *Lion Oil Company,* Civil Action No. 1:13–cv–01059–SOH.

The United States filed this lawsuit under the Clean Water Act. The United States' complaint seeks injunctive relief and civil penalties for discharges of pollutants, in violation of Section 301 of the Clean Water Act, at property located southwest of the city of El Dorado, Arkansas. The consent decree requires the defendant to perform injunctive relief and pay a $504,000 penalty.

The publication of the notice opens a period for public comment on the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Lion Oil Company,* D.J. Ref. No. 90–5–2–1–06064/4. 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 email ...	*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.usdoj.gov/enrd/Consent_Decrees.html.* 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 $9.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–17757 Filed 7–23–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Water Act

On July 18, 2013, the Department of Justice lodged a proposed Consent Decree (''Decree'') with the United States District Court for the Middle District of Pennsylvania in the lawsuit entitled *United States* v. *XTO Energy, Inc.* (''Defendant''), Civil Action No. 4:13–cv–01954–MWB.

In this action the United States, on behalf of the Environmental Protection Agency (''EPA''), filed a complaint against Defendant seeking permanent injunctive relief and civil penalties under the Clean Water Act (''CWA''), 33 U.S.C. 1251–1387, resulting from unauthorized discharges of flowback fluid and produced fluid into waters of the United States from tanks and valves associated with Defendant's hydraulic fracturing operations at Defendant's well pad and storage facility located at 301 Marquardt Road, in Penn Township, Lycoming County, Pennsylvania. Produced fluid and flowback fluid contain contaminants such as barium, calcium, iron, magnesium, manganese, potassium, sodium, strontium, bromide, chloride, and total dissolved solids. The Decree requires Defendant to undertake compliance measures to prevent and contain future releases. These measures include installation of secondary containment, high level shut-down devices, and caps, flanges and plugs at Defendant's existing and new natural gas wells within EPA Region 3; implementation of standard operating procedures for tank loading and unloading; and an obligation to increase recycling of produced fluid and flowback fluid. In addition, the Decree requires the Defendant to pay within thirty (30) days the sum of $100,000 as a civil penalty, together with interest accruing from the date on which the Decree is lodged with the court.

The publication of this notice opens a period for public comment on the Decree. Comments should be addressed to the Acting Assistant Attorney General, Environment and Natural Resources Division and should refer to *United States* v. *XTO Energy, Inc.,* D.J. Ref. 90–5–1–1–10439. 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 email	*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 Decree may be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the 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 in the amount of $10.00 (.25 cents per page reproduction cost) payable to the U.S. Treasury.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–17719 Filed 7–23–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

167th Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the 167th open meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans (also known as the ERISA Advisory Council) will be held on August 27–29, 2013.

The three-day meeting will take place at the U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210 in C5521 Room 4. The meeting will run from 9:00 a.m. to approximately 5:30 p.m. on August 27–28 and from 8:30 a.m. to 5 p.m. on August 29, with a one hour break for lunch each day. The purpose of the open meeting is for Advisory Council members to hear testimony from invited witnesses and to receive an update from the Employee Benefits Security Administration (EBSA). The EBSA update is scheduled for the morning of August 28, subject to change.

The Advisory Council will study the following issues: (1) Successful Retirement Plan Communications for Various Population Segments, (2), Locating Missing and Lost Participants, and (3) Private Sector Pension De-risking and Participant Protections. The schedule for testimony and discussion of these issues generally will be one issue per day in the order noted above. Descriptions of these topics are available on the Advisory Council page of the EBSA Web site, at *www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html.*

Organizations or members of the public wishing to submit a written statement may do so by submitting 30 copies on or before August 20, 2013 to Larry Good, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Suite N–5623, 200 Constitution Avenue NW., Washington, DC 20210. Statements also may be submitted as email attachments in text or pdf format transmitted to *good.larry@dol.gov.* It is requested that statements not be included in the body of the email. Statements deemed relevant by the Advisory Council and received on or before August 20 will be included in the record of the meeting and made available to the public, along with witness statements. Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. Written statements submitted by invited witnesses will be posted on the Advisory Council page of the EBSA Web site, without change, and can be retrieved by most Internet search engines.

Individuals or representatives of organizations wishing to address the Advisory Council should forward their requests to the Executive Secretary or telephone (202) 693–8668. Oral presentations will be limited to 10 minutes, time permitting, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact the Executive Secretary by August 20.

Signed at Washington, DC, this 18th day of July, 2013.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 2013–17761 Filed 7–23–13; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection for Veterans Retraining Assistance Program Participant (VRAP) Outreach Reporting, Extension Without Changes

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act (PRA) of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, ETA is soliciting comments concerning the collection of data about ''Veterans Retraining Assistance Program Participant Outreach Reporting'' which is a request for an extension without changes to the data collection from State Workforce

Agencies (SWA), collected on a quarterly basis. We will use this information collection to ensure that VRAP participants are offered employment services after they complete the program as required in the VOW to Hire Heroes Act of 2011.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before September 23, 2013.

ADDRESSES: Submit written comments to Andrew Ridgeway, Office of Workforce Investment, Room S–4203, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Telephone number: 202–693–3536 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD). Fax: 202–693–3817. Email: *Ridgeway.Andrew@dol.gov.* A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed above.

SUPPLEMENTARY INFORMATION:

I. Background

ETA seeks extension without changes for its approval (OMB Control Number: 1205–0511) of the collection of quarterly outreach reports from SWA on VRAP, which is part of the VOW to Hire Heroes Act of 2011 (Pub. L. 112–56). VRAP is a new training program for eligible veterans funded by the Department of Veterans Affairs (VA). The program requires DOL to offer employment placement services to each veteran who participated in the VRAP within 30 days of their completion or termination. VA, in collaboration with DOL, is required to submit a report to Congress by July 1, 2014, on the outcomes of the program. The statutorily required report must include the total number of eligible veterans who participated, the associates degrees or certificates awarded (or other similar evidence of the completion of the program of education or training earned), and data related to the employment status of eligible veterans who participated in the program. The program was authorized to enroll up to 45,000 veterans in Fiscal Year 2012, from July 1, 2012 through September 30, 2012, and up to 54,000 additional veterans from October 1, 2012, through October 1, 2013, with all training to conclude no later than March 31, 2014.

VRAP provides up to 12 months of full-time retraining assistance (currently $1,564 per month) in a ''high demand'' occupation to eligible veterans at a VA approved community college or technical school. VRAP provides the benefit to veterans who fulfill the following eligibility criteria: as of date of application, is at least 35 years old and less than 60; discharged from active duty under conditions other than dishonorable; is unemployed as of date of application; is not eligible to receive other educational assistance from the VA; is not in receipt of compensation for a service-connected disability rated totally disabling by reason of unemployability; was not and is not enrolled in any Federal or State job training program within the previous 180 days; and, the application must be submitted not later than October 1, 2013.

Once the veteran has terminated or completed the VRAP, the VA transmits a secure participant report to DOL so that employment services can be offered to the participant and program outcomes can be reported. DOL will transmit a report to each State on VRAP participants within that State who terminated or completed VRAP. DOL will transmit each State's file on a weekly basis using a secure File Transfer Protocol site. Each State will be able to access only its file so that it can disseminate the participant information securely to the appropriate American Job Center (AJC) staff in the participant's local area enabling the AJC to offer employment services to the veteran.

To ensure employment services are being offered and outcomes are being tracked for all participants, ETA is proposing to collect quarterly reports from the States, with a 45-day reporting period following each quarter, on the outreach offered to VRAP participants. In order to reduce the amount of participant information being transferred, ETA is proposing to add two data fields to the participant report it sends to the States. The report will be in Microsoft Excel format and will include a ''unique identifier'' field (not personally identifiable information), assigned by ETA and an ''Employment Assistance'' field which will be blank. The collection instrument is included as an attachment in the ICR package. The SWA tracking the outreach offered to each VRAP participant will complete the ''Employment Assistance'' field. ETA is seeking an extension without changes of its approval from OMB to collect from each State the ''unique identifier'' field and the ''Employment Assistance'' field on a quarterly basis.

This information collection is subject to PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

II. Review Focus

The Department is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

Type of Review: Extension without changes.

Title: Veterans Retraining Assistance Program Participant Outreach Reporting.

OMB Number: 1205–0511.

Affected Public: State Workforce Agency staff and American Job Center staff.

Form(s): Participant Dissemination Form and Quarterly Report Form.

Total Annual Burden Cost for Respondents: 0.

Data collection activity	Number of respondents	Frequency	Total responses	Average time per response (in minutes)	Burden hours
Participant Contact List Dissemination	54	52	2,808	60	2,808
Contacting VRAP Participant	44,500	1	44,500	10	7,417
Quarterly Report Preparation	54	4	216	90	324
Total					10,549

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB extension of approval of the ICR; they will also become a matter of public record.

Dated: July 16, 2013.

Gerri Fiala,

Acting Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2013–17762 Filed 7–23–13; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL LABOR RELATIONS BOARD

Amendment of Statement of Organization and Functions; Restructuring of National Labor Relations Board's Field Organization

July 19, 2013.

AGENCY: National Labor Relations Board.

ACTION: Notice of administrative change in status of the following offices of the National Labor Relations Board.

- Puerto Rico Regional Office (Region 24) to be designated as Subregional Office (Subregion 24) of the Tampa Regional Office (Region 12)
- Milwaukee Regional Office (Region 30) to be designated as Subregional Office (Subregion 30) of the Minneapolis Regional Office (Region 18)

SUMMARY: The National Labor Relations Board is restructuring its Regional Offices in Puerto Rico and Milwaukee to designate them as Subregional Offices assigned to the supervision of the Tampa and Minneapolis Regional Offices, respectively. Concurrent with this Notice, the National Labor Relations Board is revising its Statement of Organization and Functions accordingly.

These changes are prompted by a decline in unfair labor practice and representation case filings in each of the Regional Offices subject to this restructuring and a desire to equalize caseload and case management responsibilities in all affected Offices. The revisions are nonsubstantive or merely procedural in nature.

DATES: *Effective Date:* The changes announced above with respect to the Puerto Rico and Tampa offices will be effective September 1, 2013. The changes announced above with respect to the Milwaukee and Minneapolis offices will be effective August 1, 2013.

FOR FURTHER INFORMATION CONTACT: Gary Shinners, Executive Secretary, 1099 14th Street NW., Room 11600, Washington, DC 20570. Telephone: (202) 273–1067.

SUPPLEMENTARY INFORMATION: The National Labor Relations Board has decided to restructure the status of the Agency's Regional Offices in Puerto Rico and Milwaukee to designate them as Subregional Offices of the Tampa and Minneapolis Regional Offices, respectively. The Puerto Rico office will be redesignated as Subregion 24; the Milwaukee office will be redesignated as Subregion 30. These changes are prompted by a decline in unfair labor practice and representation case filings in each of the Regional Offices subject to this restructuring and a desire to equalize caseload and case management responsibilities in all affected Offices.

The Puerto Rico and Milwaukee Regional Offices have been headed by a Regional Director, who had full authority for the processing of both unfair labor practice and representation cases. The newly-designated Subregional Offices will now be headed by an Officer-in-Charge, who will report to their respective Regional Directors in Tampa and Minneapolis. These changes will vest these Regional Directors with casehandling authority for the geographical area covered by their newly-designated Subregional Office. The geographical areas covered by the Subregional Offices will continue to be the same as when they were designated as Regional Offices.

The most recent list of Regional and Subregional Offices was published at 65 FR 53228–53229 on August 29, 2000, as amended at 77 FR 72886–01 on December 6, 2012.

Concurrent with this Notice, the NLRB is revising its Statement of Organization and Functions to reflect the addition of Subregions 24 and 30 supervised by their respective Regional Offices and the elimination of Regions 24 and 30 as Regional Offices. The revisions to the Board's Statement of Organization and Functions are attached hereto.

Since April 2013, the NLRB has solicited and received feedback on the proposed restructuring of these offices. The decision to restructure the Agency's operations in the manner set forth herein was informed by comments from stakeholders, members of Congress and Agency employees. Because this is a general notice that is related to the organization of the NLRB, it is not a regulation or rule subject to Executive Order 12866.

Pursuant to the changes set forth herein, the National Labor Relations Board is amending its Statement of Organization and Functions as follows:

Part 201—Description of Organization

Subpart B—Description of Field Organization

(A) Section 203 is amended to read as follows:

Sec. 203 *Regional Offices.* There are 26 Regional Offices through which the Board conducts its business. Certain of the Regions have Subregional Offices or Resident Offices in addition to the central Regional Office. The areas constituting the Regions and the location of the Regional, Subregional, and Resident Offices are set forth in an appendix hereto. Each Regional Office staff is headed by a Regional Director appointed by the Board on the recommendation of the General Counsel and includes a Regional Attorney, Assistant to the Regional Director, field attorneys, field examiners, and clerical staff. Each Subregional Office is headed by an officer in charge appointed in the same manner as the Regional Directors. Each Resident Office is headed by a Resident Officer.

(B) ''Appendix—Regional and Subregional Offices'' is amended to read as follows:

Appendix—Regional and Subregional Offices

Alphabetical list of States showing location in relation to Regions and Subregions. (Note that respective Region number follows Subregion number to facilitate locating areas serviced.)

REGION AND SUBREGION NOS.

Alabama	10, 15
Alaska	19
Arizona	28
Arkansas	16, SR–26 (15)
California	20, 21, 31, 32
Colorado	27
Connecticut	SR–34 (1)
Delaware	4, 5
District of Columbia.	5
Florida	12, 15
Georgia	10, 12
Hawaii	SR–37 (20)
Idaho	19, 27
Illinois	13, 14, SR–33 (25)
Indiana	9, 13, 25
Iowa	SR–17 (14), 18, SR–33 (25)
Kansas	SR–17 (14)
Kentucky	9, 10, 25
Louisiana	15
Maine	1
Maryland	5
Massachusetts	1
Michigan	7, SR–30 (18)
Minnesota	18
Mississippi	15, SR–26 (15)
Missouri	14, SR–17 (14), SR–26 (15)
Montana	19, 27
Nebraska	27, S–17 (14)
Nevada	28, 32
New Hampshire	1
New Jersey	4, 22
New Mexico	28
New York	2, 3, 29
North Carolina	S–11 (10)
North Dakota	18
Ohio	8, 9
Oklahoma	SR–17 (14)
Oregon	SR–36 (19)
Pennsylvania	4, 5, 6
Rhode Island	1
South Carolina	SR–11 (10)
South Dakota	18
Tennessee	10, SR–11 (10), SR–26 (15)
Texas	16, 28
Utah	27
Vermont	1
Virginia	5, SR–11 (10)
Washington	19, SR–36 (19)
West Virginia	5, 6, 9, SR–11 (10)
Wisconsin	18, SR–30 (18)
Wyoming	27
Puerto Rico	SR–24 (12)
U.S. Virgin Islands	SR–24 (12)

(C) ''Areas Served by Regional and Subregional Offices'' is amended in following manner:

(1) Delete Reference to Region 24

(2) Region 12 is amended to read as follows:

Region 12. Tampa, Florida. In Florida, services Alachua, Baker, Bradford, Brevard, Broward, Charlotte, Citrus, Clay, Collier, Columbia, Dad, De Soto, Dixie, Duval, Flagler, Gadsden, Gilchrist, Glades, Hamilton, Hardee, Hendry, Hernando, Highlands, Hillsborough, Indian River, Jefferson, Lafayette, Lake, Lee Leon, Levy, Madison, Manatee, Marion, Martin, Monroe, Nassau, Okeechobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Putnam, St. Johns, St. Lucie, Sarasota, Seminole, Sumter, Suwannee, Taylor, Union, Volusia and Wakulla Counties; and in Georgia services Appling, Atkinson, Bacon, Brantley, Brooks, Camden, Charlton, Clinch, Coffee, Decatur, Echols, Glynn, Grady, Jeff Davis, Lanier, Lowndes, Pierce, Seminole, Thomas, Ware, and Wayne Counties.

Subregion 24. Hato Rey, Puerto Rico, Services Puerto Rico and the U.S. Virgin Islands.

Persons may also obtain service at the Resident Offices located in Miami and Jacksonville, Florida.

(3) Delete reference to Region 30

(4) Region 18 is amended to read as follows:

Region 18. Minneapolis, Minnesota. Service North Dakota, South Dakota, and Minnesota; in Iowa, services Adair, Adams, Allamakee, Appanoose, Audubon, Benton, Black Hawk, Boone, Bremer, Buchanan, Buena Vista, Butler, Calhoun, Carroll, Cass, Cedar, Cerro Gordo, Cherokee, Chickasaw, Clarke, Clay, Clayton, Crawford, Dallas, Davis, Decatur, Delaware, Dickinson, Emmett, Fayette, Floyd, Franklin, Greene, Grundy, Guthrie, Hamilton, Hancock, Hardin, Harrison, Henry, Howard, Humboldt, Ida, Iowa, Jasper, Jefferson, Johnson, Jones, Keokuk, Kossuth, Linn, Lucas, Lyon, Madison, Mahaska, Marion, Marshall, Mitchell, Monona, Monroe, Montgomery, O'Brien, Osceola, Page, Palo Alto, Plymouth, Pocahontas, Polk, Poweshiek, Ringgold, Sac, Shelby, Sioux, Story, Tama, Taylor, Union, Van Buren, Wapello, Warren, Washington, Wayne, Webster, Winnebago, Winneshiek, Woodbury, Worth and Wright Counties; and in Wisconsin, services Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Douglas, Dunn, Eau Clair, Iron, Jackson, Pepin, Pierce, Polk, Price, Rusk, St. Croix, Sawyer, Taylor, Trempealeau, and Washburn counties.

Subregion 30. Milwaukee, Wisconsin. In Wisconsin, services Adams, Brown, Calumet, Columbia, Crawford, Dane, Dodge, Door, Florence, Fond du Lac, Forest, Grant, Green, Green Lake, Iowa, Jefferson, Juneau, Kenosha, Kewaunee, La Crosse, Lafayette, Langlade, Lincoln, Manitowoc, Marathon, Marinette, Marquette, Menominee, Milwaukee, Monroe, Oconto, Oneida, Outagamie, Ozaukee, Portage, Racine, Richland, Rock, Sauk, Shawano, Sheboygan, Vernon, Vilas, Walworth, Washington, Waukesha, Waupaca, Waushara, Winnebago, and Wood Counties; and in Michigan, services Alger, Baraga, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Marquette, Menominee and Ontonagon Counties.

Persons may also obtain service at the Resident Office located in Des Moines, Iowa.

By Direction of the Board.

Dated: July 19, 2013.

William B. Cowen,

Solicitor.

[FR Doc. 2013–17818 Filed 7–23–13; 8:45 am]

BILLING CODE 7545–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–454, 50–455, 50–456, 50–457; NRC–2013–0126]

Byron Nuclear Station, Units 1 and 2, and Braidwood Nuclear Station, Units 1 and 2; Exelon Generation Company, LLC

AGENCY: Nuclear Regulatory Commission.

ACTION: License renewal application; notice of docketing and opportunity to request a hearing and to petition for leave to intervene.

SUMMARY: This is a notice of acceptance for docketing and notice of opportunity for hearing regarding the renewal of operating licenses for the Byron Nuclear Station (Byron), Units 1 and 2, and the Braidwood Nuclear Station (Braidwood), Units 1 and 2. The NRC is considering an application for the renewal of operating licenses NPF–37, NPF–66, NPF–72, and NPF–77, which authorize Exelon Generation Company, LLC (Exelon), to operate Byron, Units 1 and 2, at 3586.6 megawatts thermal each, and Braidwood, Units 1 and 2, at 3586.6 megawatts thermal each. Byron, Units 1 and 2, are located near Byron, IL; Braidwood, Units 1 and 2, are located near Braidwood, IL. The renewed licenses would authorize the applicant to operate both Byron and Braidwood for an additional 20 years beyond the period specified in each of the respective current licenses. The current operating licenses for Byron expire as follows: Unit 1 (NPF–37) on October 31, 2024, and Unit 2 (NPF–66) on November 6, 2026. The current operating licenses for Braidwood expire as follows: Unit 1 (NPF–72) on October 17, 2026, and Unit 2 (NPF–77) on December 18, 2027.

ADDRESSES: Please refer to Docket ID NRC–2013–0126 when contacting the U.S. Nuclear Regulatory Commission (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, using any of the following methods:

- *Federal rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0126. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.*
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is availa*ble in ADAMS) is provided the first time* that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: John Daily, Senior Project Manager, Projects Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory *Commission, Washing*ton, DC 20555; telephone: 301–415–3873; email: *John.Daily@nrc.gov.*

SUPPLEMENTARY INFORMATION: Exelon submitted the application dated May 29, 2013, pursuant to Part 54 of Title 10 of the *Code of Federal Regulations* (10 CFR Part 54), to renew operating licenses NPF–37, NPF–66, NPF–72, and NPF–77. A notice of receipt and availability of the license renewal application (LRA) was published in the **Federal Register** on June 13, 2013 (78 FR 35646).

The Commission's staff has determined that Exelon has submitted sufficient information in accordance with 10 CFR 54.19, 54.21, 54.22, 54.23, 51.45, and 51.53(c), to enable the staff to undertake a review of the application, and that the application is therefore acceptable for docketing. The current Docket numbers, 50–454, 50–455, 50–456, and 50–457, for operating license numbers NPF–37, NPF–66, NPF–72, and NPF–77, respectively, will be retained. The determination to accept the LRA for docketing does not constitute a determination that a renewed license should be issued, and does not preclude the NRC staff from requesting additional information as the review proceeds.

Before issuance of the requested renewed licenses, the NRC will have made the findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. In accordance with 10 CFR 54.29, the NRC may issue a renewed license on the basis of its review if it finds that actions have been identified and have been or will be taken with respect to: (1) Managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified as requiring aging management review; and (2) time-limited aging analyses that have been identified as requiring review, such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the current licensing basis (CLB) and that any changes made to the plant's CLB will comply with the Act and the Commission's regulations.

Additionally, in accordance with 10 CFR 51.95(c), the NRC will prepare an environmental impact statement for each site as supplements to the Commission's NUREG–1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants,'' dated May 1996. In considering the LRA, the Commission must find that the applicable requirements of Subpart A of 10 CFR part 51 have been satisfied, and that matters raised under 10 CFR 2.335 have been addressed. Pursuant to 10 CFR 51.26, and as part of the environmental scoping process, the staff intends to hold public scoping meetings. Detailed information regarding the environmental scoping meetings will be the subject of a separate **Federal Register** notice.

Within 60 days after the date of publication of this **Federal Register** notice, any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene with respect to the renewal of the licenses. Requests for a hearing or petitions for leave to intervene must be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852, and is accessible from the NRC Library on the Internet at *http://www.nrc.gov/reading-rm/adams.html.http://www.nrc.gov/readingrm/adams.html* Persons who do not have access to the Internet or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 1–800–397–4209, or 301–415–4737, or by email at *PDR.Resource@nrc.gov.* If a request for a hearing/petition for leave to intervene is filed within the 60-day period, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel will rule on the request and/or petition; and the Secretary of the Commission (Secretary) or the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel will issue a notice of a hearing or an appropriate order. In the event that no request for a hearing or petition for leave to intervene is filed within the 60-day period, the NRC may, upon completion of its evaluations and upon making the findings required under 10 CFR parts 51 and 54, renew the license without further notice.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding, taking into consideration the limited scope of matters that may be considered pursuant to 10 CFR parts 51 and 54. Pursuant to 10 CFR 2.309(d), the petition must provide the name, address, and telephone number of the petitioner; and specifically explain the reasons why intervention should be permitted with particular reference to the following factors for the Byron and/or Braidwood sites: (1) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

In accordance with 10 CFR 2.309(f), each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the basis for each contention and a concise statement of the alleged facts or the expert opinion that supports the contention on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the requestor/petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The requestor/petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the action under consideration. The contention must be one that, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Petitions filed after the deadline, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the Atomic Safety and Licensing Board Panel or a Presiding Officer that the filing demonstrates good cause by satisfying the following three factors in 10 CFR 2.309(c)(1): (i) The information upon which the filing is based was not previously available; (ii) The information upon which the filing is based is materially different from information previously available; and (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

A State, county, municipality, Federally-recognized Indian Tribe, or agencies thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(d)(2). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by September 23, 2013. The petition must be filed in accordance with the filing instructions described above in this notice, and should meet the requirements for petitions for leave to intervene set forth in this section, except that State and Federally-recognized Indian tribes do not need to address the standing requirements in 10 CFR 2.309(d)(1) if the facility is located within its boundaries. The entities listed above could also seek to participate in a hearing as a nonparty pursuant to 10 CFR 2.315(c).

Any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to such limits and conditions as may be imposed by the Atomic Safety and Licensing Board. Persons desiring to make a limited appearance are requested to inform the Secretary of the Commission by September 23, 2013.

The Commission requests that each contention be given a separate numeric or alpha designation within one of the following groups: (1) Technical (primarily related to safety concerns); (2) environmental; or (3) miscellaneous.

As specified in 10 CFR 2.309, if two or more requestors/petitioners seek to co-sponsor a contention or propose substantially the same contention, the requestors/petitioners will be required to jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in the NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC's Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. However, a request to intervene will require including information on local residence in order to demonstrate a proximity assertion of interest in the proceeding. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Detailed information about the license renewal process can be found under the Nuclear Reactors icon at *http://www.nrc.gov/reactors/operating/licensing/renewal.html* on the NRC's Web site. Copies of the application to renew the operating licenses for Byron and Braidwood are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852–2738, and at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html,* the NRC's Web site while the application is under review. The application may be accessed in ADAMS through the NRC Library on the Internet at *http://www.nrc.gov/reading-rm/adams.html* under ADAMS Accession No. ML131550528. As stated above, persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS may contact the NRC PDR reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by email to *pdr.resources@nrc.gov.*

The NRC staff has verified that a copy of the license renewal application is also available to local residents near Byron at the Byron Public Library, 100 S. Washington Street, Byron, IL 61010, and near Braidwood at the Fossil Ridge (Braidwood) Public Library, 386 W. Kennedy Road, Braidwood, IL 60408.

Dated at Rockville, Maryland, this 18th day of July, 2013.

For the Nuclear Regulatory Commission.

David L. Pelton,

Acting Deputy Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2013–17809 Filed 7–23–13; 8:45 am]

BILLING CODE 7590–01–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:

Regulation A (Forms 1–A and 2–A), OMB Control No. 3235–0286, SEC File No. 270–110.

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'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Regulation A (17 CFR 230.251 through 230.263) provides an exemption from registration under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) for certain limited offerings of securities by issuers who do not otherwise file reports with the Commission. Form 1–A is an offering statement filed under Regulation A. Form 2–A is filed to report the sale of securities in a Regulation A offering and the use of the proceeds raised in the offering. The paperwork burden from Regulation A is imposed through the forms that are subject to the disclosure requirements in Regulation A and is reflected in the analysis of these forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burden imposed by Regulation A to be a total of one hour. All information is provided to the public for review. The information required is filed on occasion and is mandatory. We estimate approximately 100 issuers file Forms 1–A and 2–A annually. We estimate that Form 1–A takes approximately 608 hours to prepare, Form 2–A takes approximately 12 hours to prepare for a total of 621 hours per response (including the one hour for Regulation A). We estimate that 75% of 621 hours per response (465.75 hours) is prepared by the company for a total annual burden of 46,575 hours (465.75 × 100 responses).

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view the 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, 100 F Street NE., Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: July 18, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–17723 Filed 7–23–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70004; File No. SR–MSRB–2013–06]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change To Amend MSRB Rule A–3, on Membership on the Board, To Modify the Standard of Independence for Public Board Members

July 18, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on July 3, 2013, the Municipal Securities Rulemaking Board (the ''MSRB'' or ''Board'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB is filing with the Commission a proposed rule change consisting of amendments to MSRB Rule A–3 to modify the standard of independence for public Board members (the ''proposed rule change'').

The text of the proposed rule change is available on the MSRB's Web site at *www.msrb.org/Rules-and-Interpretations/SEC-Filings/2013-Filings.aspx,* at the MSRB'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 MSRB 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 MSRB 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 MSRB is the self-regulatory organization created by Congress to establish rules governing the municipal securities activities of brokers, dealers and municipal securities dealers (collectively ''dealers'') and the municipal advisory activities of municipal advisors (collectively ''regulated entities''). It is governed by a 21-member board composed of eleven independent public members and ten regulated members.

The MSRB's mission is to protect municipal entities, investors and the public interest by promoting a fair and efficient municipal securities market. The MSRB fulfills this mission by regulating dealers and municipal advisors and providing market transparency through its Electronic Municipal Market Access (''EMMA®'') Web site.

Given the role of the board of directors in overseeing the municipal securities market, it is imperative that the board identify candidates for the board of directors who have the requisite knowledge and expertise about the municipal market and its operation.

The composition of the board of directors of the MSRB is set forth in the Act, and categorizes individuals into two broad groups: Regulated representatives and public representatives.[3] The regulated representatives must be individuals who are associated with a regulated entity, and at least one of whom must be associated with a dealer that is not a bank (or subsidiary or department or division thereof), at least one of whom must be associated with a dealer that is a bank (or subsidiary or department or division thereof), and at least one of whom must be associated with a municipal advisor.[4]

The public representatives must be independent of any regulated entity, and at least one of whom must be representative of institutional or retail investors, at least one of whom must be representative of municipal entities, and at least one of whom must be a member of the public with knowledge of or experience in the municipal industry.

While Congress, as part of the Dodd-Frank Act, revised the statutory composition of the board of directors, it did not specify the requirements for independence of public representatives. Rather, it delegated the obligation to the MSRB.[5]

In 2010, in implementing this new standard, the MSRB amended Rule A–3 to define independent of any regulated entity to mean an individual who has ''no material business relationship'' with any regulated entity.[6] The MSRB defined ''no material business relationship'' to mean that, at a minimum: (a) The individual is not and, within the last two years, was not associated with a regulated entity, and (b) the individual does not have a relationship with any regulated entity, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision making of the individual.

In practice, this standard has precluded consideration of otherwise viable candidates who are knowledgeable of matters related to the municipal securities market from serving as public representatives because such candidates are encompassed within the broad definition of ''associated with'' a regulated entity under the Act. This standard of independence disqualifies many individuals with the expertise and knowledge to represent investors because such persons have a regulated entity within their employer's corporate structure, even if the individual's nexus with such regulated entity is remote and cannot reasonably be seen as affecting his or her independent judgment or decision-making.

For example, a candidate whose only affiliation with a broker-dealer registered with the MSRB is due to the individual's service as an independent director on the board of directors of a company that is in the same corporate family as the broker-dealer would be disqualified from serving on the board as a public representative. Similarly, because many mutual fund and insurance companies have affiliated broker-dealers that engage in a municipal securities or municipal fund securities business, any non-clerical individual within such a company would be precluded from serving as a public representative even if the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78o–4(b)(1).

[4] MSRB Rule A–3 further requires that at least one, but not less than 30 percent of the total number of regulated representatives, must be associated with and representative of non-dealer municipal advisors.

[5] *See* 15 U.S.C. 78o–4(b)(2)(B)(iv).

[6] *See* Securities Exchange Act Release 34–63025 (September 30, 2010); 75 FR 61806 (October 6, 2010); File No. SR–MSRB–2010–08.

individual's role and responsibilities are wholly unrelated to the broker-dealer activity or such broker-dealer activity is a *de minimis* portion of the company's overall business.

To address this shortcoming, and consistent with the approach of the Financial Industry Regulatory Authority (''FINRA''),[7] another self-regulatory organization, the MSRB proposes amending Rule A–3 to set forth a more function-oriented approach to defining independence. Specifically, the term ''no material business relationship'' will require that an individual is not, and within the last two years, was not an officer, director (other than as an independent director), employee or controlling person of any regulated entity. Replacing the ''associated with'' language with the more function-oriented language described above does not have any effect on the portion of the ''no material business relationship'' provision in Rule A–3(g)(ii) that prohibits an individual from having a relationship with any regulated entity, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision making of the individual. This provision of Rule A–3 ensures that an individual with a meaningful nexus with a regulated entity, either by position or function, will not be an eligible candidate to serve as a public representative.

The proposed rule change will, however, allow the MSRB to consider candidates who are associated with regulated entities solely by virtue of the corporate structure of their employer. Removing these limitations will allow the MSRB to consider a broader group of public representative board candidates, with an appropriate level of independence, and with the objective of maximizing the depth of municipal securities knowledge and experience on the board. Regardless of their status—public or regulated—all board members have a fiduciary duty to the MSRB and are bound by a duty of loyalty and duty of care and are obligated to act in the best interests of the organization and to avoid conflicts of interest.[8]

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with the Act and, in particular, Section 15B(b) of the Act,[9] which provides, in part, that the MSRB shall be composed of a majority of public members who are independent (as defined by the MSRB) of regulated entities. This section further requires that all members of the board must be knowledgeable regarding the municipal securities market. The proposed rule change will allow the MSRB to consider candidates who are associated with regulated entities solely by virtue of the corporate structure of their employer. Removing these limitations will allow the MSRB to consider a broader group of public representative board candidates, with an appropriate level of independence, and with the objective of maximizing the depth of municipal securities knowledge and experience on the board. Having such expertise on the board will ensure that the board has sufficient knowledge and perspective of all aspects of the municipal securities market and is well-positioned to carry out its statutory obligation ''to protect investors, municipal entities, obligated persons, and the public interest.''[10]

The proposed rule change broadens the existing independence standard and public representative board candidates would no longer be automatically disqualified solely by virtue of a tenuous corporate affiliation with a regulated entity. As noted above, the proposed rule change also makes the MSRB independence standard consistent with the standard utilized by FINRA for its public governors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB 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 since it broadens the potential pool of public board candidates and provides for fair representation by qualified members of the public on the board, consistent with the Act.

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 on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period of up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

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–MSRB–2013–06 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–MSRB–2013–06. 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

[7] FINRA Bylaws, Article I, defines an industry governor, in part, to include an individual who is or has served in the prior year as an officer, director (other than as an independent director), employee or controlling person of a broker or dealer and a public governor, in part, as in individual who is not an industry governor and who otherwise has no material business relationship with a broker or dealer.

[8] The MSRB is a Virginia nonstock corporation. *See* Va. Nonstock Corporations Act § 13.1–870 (''A director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation''), 13.1–871 (''A conflict of interests transaction is a transaction with the corporation in which a director of the corporation has an interest that precludes him from being a disinterested director.''); *Bates* v. *Cekada,* 130 F.R.D. 52, 1990 U.S. Dist. LEXIS 1571, 16 Fed. R. Serv. 3d (Callaghan) 282 (E.D. Va. 1990) (''Directors have a fiduciary duty to act for the benefit of the corporation . . .'').

[9] 15 U.S.C. 78o–4(b).

[10] 15 U.S.C. 78o–4(b)(2)(C).

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 MSRB. 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–MSRB–2013–06 and should be submitted on or before August 14, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–17724 Filed 7–23–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70005; File No. SR–NYSEARCA–2013–71]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To List and Trade Shares of the SPDR SSgA Ultra Short Term Bond ETF; SPDR SSgA Conservative Ultra Short Term Bond ETF; and SPDR SSgA Aggressive Ultra Short Term Bond ETF Under NYSE Arca Equities Rule 8.600

July 18, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on July 9, 2013, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the following under NYSE Arca Equities Rule 8.600: SPDR SSgA Ultra Short Term Bond ETF; SPDR SSgA Conservative Ultra Short Term Bond ETF; and SPDR SSgA Aggressive Ultra Short Term Bond ETF. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares of the following under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares [4]: SPDR SSgA Ultra Short Term Bond ETF; SPDR SSgA Conservative Ultra Short Term Bond ETF; and SPDR SSgA Aggressive Ultra Short Term Bond ETF (each, a ''Fund'' and, collectively, the ''Funds''). The Shares will be offered by SSgA Active ETF Trust (the ''Trust''), which is organized as a Massachusetts business trust and is registered with the Commission as an open-end management investment company.[5] SSgA Funds Management, Inc. (the ''Adviser'' or ''SSgA FM'') will serve as the investment adviser to the Funds. State Street Global Markets, LLC (the ''Distributor'') will be the principal underwriter and distributor of the Funds' Shares. State Street Bank and Trust Company (the ''Administrator'', ''Custodian'' or ''Transfer Agent'') will serve as administrator, custodian and transfer agent for the Funds.[6]

Commentary .06 to Rule 8.600 provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a ''fire wall'' between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio. In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund's portfolio.[7] Commentary .06 to Rule

[4] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act'') organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[5] The Trust is registered under the 1940 Act. On August 2, 2012, the Trust filed with the Commission an amendment to its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a) (''Securities Act''), and under the 1940 Act relating to the Funds (File Nos. 333–173276 and 811–22542) (''Registration Statement''). The description of the operation of the Trust and the Funds herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the1940 Act. *See* Investment Company Act Release No. 29524 (December 13, 2010) (File No. 812–13487) (''Exemptive Order'').

[6] The Commission has previously approved listing and trading on the Exchange of a number of actively managed funds under Rule 8.600. *See, e.g.,* Securities Exchange Act Release Nos. 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR–NYSEArca–2008–31) (order approving Exchange listing and trading of twelve actively-managed funds of the WisdomTree Trust); 60981 (November 10, 2009), 74 FR 59594 (November 18, 2009) (SR–NYSEArca–2009–79) (order approving listing and trading of five fixed income funds of the PIMCO ETF Trust); 66343 (February 7, 2012), 77 FR 7647 (February 13, 2012) (SR–NYSEArca–2011–85) (order approving listing and trading of SPDR SSgAReal Assets ETF; SPDR SSgA Income Allocation ETF; SPDR SSgAConservative Global Allocation ETF; SPDR SSgA Global Allocation ETF; and SPDR SSgA Aggressive Global).

[7] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the ''Advisers Act''). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication

Continued

8.600 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Equities Rule 5.2(j)(3); however, Commentary .06 in connection with the establishment of a ''fire wall'' between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. The Adviser is not registered as a broker-dealer but is affiliated with a broker-dealer and has implemented a ''fire wall'' with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the Funds' portfolios. In the event (a) the Adviser or any sub-adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, they will implement a fire wall with respect to their relevant personnel or broker-dealer affiliate regarding access to information concerning the composition and/or changes to a portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

SPDR SSgA Ultra Short Term Bond ETF

According to the Registration Statement, the SPDR SSgA Ultra Short Term Bond ETF seeks to provide current income consistent with preservation of capital and daily liquidity through short duration high quality investments. Under normal circumstances,[8] the Fund will invest all of its assets in the SSgA Ultra Short Term Bond Portfolio (the ''Bond Portfolio''), a separate series of the SSgA Master Trust with an identical investment objective as the Fund. As a result, the Fund will invest indirectly through the Bond Portfolio.

The Adviser will invest, under normal circumstances, at least 80% of the Bond Portfolio's net assets (plus the amount of borrowings for investment purposes) in a diversified portfolio of U.S. dollar-denominated investment grade fixed income securities. The Bond Portfolio primarily will invest in investment grade fixed income securities that are rated a minimum of the lowest A rating by any Nationally Recognized Statistical Ratings Organization (''NRSRO''), or, if unrated, determined by the management team (who are employees of the Adviser) to be of equivalent quality.[9] The Bond Portfolio will invest in fixed and floating rate securities of varying maturities,[10] such as corporate obligations (including commercial paper of U.S. and foreign entities, master demand notes (subject to the 15% illiquid securities limit), and medium term notes); government bonds (including U.S. Treasury Bills, notes, and bonds); agency securities, including U.S. government agency securities, and non-U.S. sovereign and supranational debt; privately-issued securities (which, for example, can be Rule 144A securities); asset-backed and mortgage-backed securities; and money market instruments (including U.S. and foreign bank time deposits, certificates of deposit, and banker acceptances). Under normal circumstances, the effective duration of the Bond Portfolio is expected to be between three and nine months.[11] In addition, the Bond Portfolio expects to maintain a weighted average maturity between six and eighteen months.[12] For the purposes of determining the Bond Portfolio's weighted average maturity, a security's final maturity date, or for amortizing securities such as asset-backed and mortgage-backed securities, its weighted average life will be used for calculation purposes.

SPDR SSgA Conservative Ultra Short Term Bond ETF

According to the Registration Statement, the SPDR SSgA Conservative Ultra Short Term Bond ETF will seek to provide current income consistent with preservation of capital and daily liquidity through short duration high quality investments with the avoidance of excessive portfolio volatility.

Under normal circumstances, the Fund will invest all of its assets in the SSgA Conservative Ultra Short Term Bond Portfolio (the ''Conservative Portfolio''), a separate series of the SSgA Master Trust with an identical investment objective as the Fund. As a result, the Fund will invest indirectly through the Conservative Portfolio.

The Adviser will invest, under normal circumstances, at least 80% of the Conservative Portfolio's net assets (plus the amount of borrowings for investment purposes) in a diversified portfolio of U.S. dollar-denominated investment grade fixed income securities. The Conservative Portfolio primarily will invest in investment grade fixed income securities that are rated a minimum of the lowest A rating by any NRSRO, or, if unrated, determined by the portfolio management team (who are employees of the Adviser) to be of equivalent quality, determined as described above.[13] The Conservative Portfolio will invest in fixed and floating rate securities of varying maturities, such as corporate obligations (including commercial paper of U.S. and foreign entities, master demand notes (subject to the 15% illiquid securities limit), and medium term notes); government bonds (including U.S. Treasury Bills, notes, and bonds); agency securities; privately-issued securities (which, for example, can be Rule 144A securities); asset-backed and mortgage-backed securities; and money market instruments (including U.S. and foreign bank time deposits, certificates of deposit, and banker acceptances).

Under normal circumstances, the effective duration of the Conservative Portfolio is expected to be four months or less. In addition, the Conservative Portfolio expects to maintain a weighted average maturity between six and eighteen months.[14] For the purposes of

and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[8] 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.

[9] According to the Adviser, the Adviser may determine that unrated securities are of ''equivalent quality'' based on such credit quality factors that it deems appropriate, which may include, among other things, performing an analysis similar, to the extent possible, to that performed by an NRSRO when rating similar securities and issuers. In making such a determination, the Adviser may consider internal analyses and risk ratings, third party research and analysis, and other sources of information, as deemed appropriate by the Adviser.

[10] A floating rate security provides for the automatic adjustment of its interest rate whenever a specified interest rate changes. Interest rates on these securities are ordinarily tied to, and are a percentage of, a widely recognized interest rate, such as the yield on 90-day U.S. Treasury bills or the prime rate of a specified bank. These rates may change as often as twice daily.

[11] Effective duration is a measure of the Bond Portfolio's price sensitivity to changes in yields or interest rates. Duration will be a distinguishing factor among the Funds, and each of the Funds' respective portfolios will have different effective durations, as described below.

[12] Weighted average maturity is a U.S. dollar-weighted average of the remaining term to maturity of the underlying securities in the Bond Portfolio.

[13] *See* note 9, *supra.*

[14] *See* note 11, *supra.*

determining the Conservative Portfolio's weighted average maturity, a security's final maturity date, or for amortizing securities such as asset-backed and mortgage-backed securities, its weighted average life will be used for calculation purposes.[15]

SPDR SSgA Aggressive Ultra Short Term Bond ETF

According to the Registration Statement, the SPDR SSgA Aggressive Ultra Short Term Bond ETF will seek to maximize income consistent with preservation of capital through short duration high quality investments.

Under normal circumstances, the Fund will invest all of its assets in the SSgA Aggressive Ultra Short Term Bond Portfolio (the ''Aggressive Portfolio'' and, together with the Bond Portfolio and the Conservative Portfolio, the ''Portfolios''), a separate series of the SSgA Master Trust with an identical investment objective as the Fund. As a result, the Fund will invest indirectly through the Aggressive Portfolio.

The Adviser will invest, under normal circumstances, at least 80% of the Aggressive Portfolio's net assets (plus the amount of borrowings for investment purposes) in a diversified portfolio of U.S. dollar-denominated investment grade fixed income securities. The Aggressive Portfolio primarily will invest in investment grade fixed income securities that are rated a minimum of the lowest BBB rating by any NRSRO or, if unrated, determined by the portfolio management team (who are employees of the Adviser) to be of equivalent quality, determined as described above.[16]

The Aggressive Portfolio will invest in fixed and floating rate securities of varying maturities, such as corporate obligations (including commercial paper of U.S. and foreign entities, master demand notes (subject to the 15% illiquid securities limit), and medium term notes); government bonds (including U.S. Treasury Bills, notes, and bonds); agency securities; privately-issued securities (which, for example, can be Rule 144A securities); asset-backed and mortgage-backed securities; and money market instruments (including U.S. and foreign bank time deposits, certificates of deposit, and banker acceptances).

Under normal circumstances, the effective duration of the Aggressive Portfolio is expected to be between six and twelve months.[17] In addition, the Aggressive Portfolio expects to maintain a weighted average maturity between 1.5 and 2.5 years. For the purposes of determining the Aggressive Portfolio's weighted average maturity, a security's final maturity date, or for amortizing securities such as asset-backed and mortgage-backed securities, its weighted average life will be used for calculation purposes.[18]

Principal Investment Policies for the Funds

According to the Registration Statement, each Portfolio will invest in bonds, including zero coupon bonds,[19] fixed rate bonds [20] and of [sic]''floating-rate'' or ''variable-rate'' bonds.[21] In addition, each Portfolio may invest in U.S. and non-U.S. corporate bonds, which will be denominated in U.S. Dollars.

Each Portfolio may invest in collateralized loan obligations (''CLOs'') to the extent they meet the minimum NRSRO rating requirement described above for each Portfolio. A CLO is a financing company (generally called a Special Purpose Vehicle or ''SPV''), created to reapportion the risk and return characteristics of a pool of assets. While the assets underlying CLOs are typically ''Senior Loans'',[22] the assets may also include (i) unsecured loans, (ii) other debt securities that are rated below investment grade, (iii) debt tranches of other CLOs and (iv) equity securities incidental to investments in Senior Loans.[23]

Each Portfolio may invest in sovereign debt which will be denominated in U.S. Dollars. Sovereign debt obligations are issued or guaranteed by foreign governments or their agencies. Sovereign debt may be in the form of conventional securities or other types of debt instruments such as loans or loan participations. Governmental entities responsible for repayment of the debt may be unable or unwilling to repay principal and pay interest when due, and may require renegotiation or reschedule of debt payments. In addition, prospects for repayment of principal and payment of interest may depend on political as well as economic factors. Although some sovereign debt, such as Brady Bonds, is collateralized by U.S. Government securities, repayment of principal and payment of

[15] *See* note 12, *supra.*

[16] *See* note 9, *supra.*

[17] *See* note 11, *supra.*

[18] *See* note 12, *supra.*

[19] A zero coupon bond pays no interest to its holder during its life. The value of a zero coupon bond to a fund consists of the difference between such bond's face value at the time of maturity and the price for which it was acquired, which may be an amount significantly less than its face value (sometimes referred to as a ''deep discount'' price).

[20] The value of a fixed rate bond usually rises when market interest rates fall, and falls when market interest rates rise. Accordingly, a fixed rate bond's yield (income as a percent of the bond's current value) may differ from its coupon rate as its value rises or falls. Fixed rate bonds generally are also subject to inflation risk, which is the risk that the value of the bond or income from the bond will be worth less in the future as inflation decreases the value of money. This could mean that, as inflation increases, the ''real'' value of the assets of a fund holding fixed rate bonds can decline, as can the value of the fund's distributions.

[21] Variable rate securities are instruments issued or guaranteed by entities such as (1) the U.S. Government, or an agency or instrumentality thereof, (2) corporations, (3) financial institutions, (4) insurance companies or (5) trusts that have a rate of interest subject to adjustment at regular intervals but less frequently than annually. A variable rate security provides for the automatic establishment of a new interest rate on set dates. Variable rate obligations whose interest is readjusted no less frequently than annually will be deemed to have a maturity equal to the period remaining until the next readjustment of the interest rate.

[22] A Senior Loan is an advance or commitment of funds made by one or more banks or similar financial institutions, including the Portfolios, to one or more corporations, partnerships or other business entities and typically pays interest at a floating or adjusting rate that is determined periodically at a designated premium above a base lending rate, most commonly the London-Interbank Offered Rate (''LIBOR''). A Senior Loan is considered senior to all other unsecured claims against the borrower, senior to or pari passu with all other secured claims, meaning that in the event of a bankruptcy the Senior Loan, together with other first lien claims, are entitled to be the first to be repaid out of proceeds of the assets securing the loans, before other existing claims or interests receive repayment. However, in bankruptcy proceedings, there may be other claims, such as taxes or additional advances, that take precedence. Senior Loans consist generally of obligations of companies and other entities (collectively, ''borrowers'') incurred for the purpose of reorganizing the assets and liabilities of a borrower; acquiring another company; taking over control of a company (leveraged buyout); temporary refinancing; or financing internal growth or other general business purposes. Senior Loans are often obligations of borrowers who have incurred a significant percentage of debt compared to equity issued and thus are highly leveraged.

[23] When investing in CLOs, each Portfolio will not invest in equity tranches, which are the lowest tranche. However, each Portfolio may invest in lower debt tranches of CLOs, which typically experience a lower recovery, greater risk of loss or deferral or non-payment of interest than more senior debt tranches of the CLO. In addition, each Portfolio intends to invest in CLOs consisting primarily of individual Senior Loans of borrowers and not repackaged CLO obligations from other high risk pools. The underlying Senior Loans purchased by CLOs are generally performing at the time of purchase but may become non-performing, distressed or defaulted. CLOs with underlying assets of non-performing, distressed or defaulted loans are not contemplated to comprise a significant portion of a Portfolio's investments in CLOs. The key feature of the CLO structure is the prioritization of the cash flows from a pool of debt securities among the several classes of the CLO. The SPV is a company founded solely for the purpose of securitizing payment claims arising out of this diversified asset pool. On this basis, marketable securities are issued by the SPV which, due to the diversification of the underlying risk, generally represent a lower level of risk than the original assets. The redemption of the securities issued by the SPV typically takes place at maturity out of the cash flow generated by the collected claims.

interest is not guaranteed by the U.S. Government.

Each Portfolio may invest in U.S. Government obligations. U.S. Government obligations are a type of bond. U.S. Government obligations include securities issued or guaranteed as to principal and interest by the U.S. Government, its agencies or instrumentalities.[24]

The Portfolios may invest in asset-backed and commercial mortgaged-backed securities.[25] The percentage limitation of investments in asset backed and commercial mortgage-backed securities for the Bond Portfolio, the Conservative Portfolio and the Aggressive Portfolio will be 50%, 35% and 65%, respectively. The percentage limitation of an investment in each single structured collateral type of asset backed and commercial mortgage-backed securities for the Bond Portfolio, the Conservative Portfolio and the Aggressive Portfolio will be 15%, 20% and 25%, respectively. Non-agency residential mortgage-backed and commercial mortgage-backed investments each will be limited to 10% for each of the Portfolios.

The Portfolios may each invest a substantial portion of its assets in U.S. agency mortgage pass-through securities. The term ''U.S. agency mortgage pass-through security'' refers to a category of pass-through securities backed by pools of mortgages and issued by one of several U.S. government-sponsored enterprises: Ginnie Mae, Fannie Mae or Freddie Mac. In the basic mortgage pass-through structure, mortgages with similar issuer, term and coupon characteristics are collected and aggregated into a ''pool'' consisting of multiple mortgage loans. The pool is assigned a CUSIP number and undivided interests in the pool are traded and sold as pass-through securities. The holder of the security is entitled to a pro rata share of principal and interest payments (including unscheduled prepayments) from the pool of mortgage loans. Each Portfolio may invest in restricted securities. Restricted securities are securities that are not registered under the Securities Act, but which can be offered and sold to ''qualified institutional buyers'' under Rule 144A under the Securities Act.[26]

Each Portfolio may invest in short-term instruments, including money market instruments, repurchase agreements, cash and cash equivalents, on an ongoing basis to provide liquidity or for other reasons. Money market instruments are generally short-term investments that may include but are not limited to: (i) Shares of money market funds (including those advised by the Adviser); (ii) obligations issued or guaranteed by the U.S. government, its agencies or instrumentalities (including government-sponsored enterprises); (iii) negotiable certificates of deposit, bankers' acceptances, fixed time deposits and other obligations of U.S. and foreign banks (including foreign branches) and similar institutions; (iv) commercial paper rated at the date of purchase ''Prime-1'' by Moody's or ''A–1'' by S&P, or if unrated, of comparable quality as determined by the Adviser; [27] (v) non-convertible corporate debt securities (*e.g.,* bonds and debentures) with remaining maturities at the date of purchase of not more than 397 days and that satisfy the rating requirements set forth in Rule 2a–7 under the 1940 Act; and (vi) short-term U.S. dollar-denominated obligations of foreign banks (including U.S. branches) that, in the opinion of the Adviser, are of comparable quality to obligations of U.S. banks which may be purchased by a Portfolio.

The Funds are actively-managed and not tied to an index. The Exchange notes, however, that each Fund's Portfolio will meet certain criteria for index-based, fixed income exchange-traded funds contained in NYSEArca Equities Rule 5.2(j)(3), Commentary .02.[28]

Non-Principal Investment Policies for the Funds

The following are additional possible investments of each Portfolio that are not included under the 80% investment policies described above for each Fund.

Each Portfolio may invest in the securities of other investment companies, including money market funds and closed-end funds, subject to applicable limitations under Section 12(d)(1) of the 1940 Act. Each Portfolio may invest in exchange traded products (''ETPs'').[29] ETPs include ETFs

[24] One type of U.S. Government obligation, U.S. Treasury obligations, are backed by the full faith and credit of the U.S. Treasury and differ only in their interest rates, maturities, and times of issuance. U.S. Treasury bills have initial maturities of one-year or less; U.S. Treasury notes have initial maturities of one to ten years; and U.S. Treasury bonds generally have initial maturities of greater than ten years.

Other U.S. Government obligations are issued or guaranteed by agencies or instrumentalities of the U.S. Government including, but not limited to, Federal National Mortgage Association (''Fannie Mae''), the Government National Mortgage Association (''Ginnie Mae''), the Small Business Administration, the Federal Farm Credit Administration, the Federal Home Loan Mortgage Corporation (''Freddie Mac''), the Federal Home Loan Banks (''FHLB''), Banks for Cooperatives (including the Central Bank for Cooperatives), the Federal Land Banks, the Federal Intermediate Credit Banks, the Tennessee Valley Authority, the Export-Import Bank of the United States, the Commodity Credit Corporation, the Federal Financing Bank, the Student Loan Marketing Association, the National Credit Union Administration and the Federal Agricultural Mortgage Corporation (''Farmer Mac'').

[25] Asset-backed securities are securities backed by installment contracts, credit-card receivables or other assets. Commercial mortgage-backed securities are securities backed by commercial real estate properties. Both asset-backed and commercial mortgage-backed securities represent interests in ''pools'' of assets in which payments of both interest and principal on the securities are made on a regular basis.

[26] According to the Registration Statement, institutional markets for restricted securities have developed as a result of the promulgation of Rule 144A under the Securities Act, which provides a ''safe harbor'' from Securities Act registration requirements for qualifying sales to institutional investors. When Rule 144A restricted securities present an attractive investment opportunity and meet other selection criteria, a Portfolio may make such investments whether or not such securities are ''illiquid'' depending on the market that exists for the particular security. The Trust's Board of Trustees (''Board'') has delegated the responsibility for determining the liquidity of Rule 144A restricted securities that a Portfolio may invest in to the Adviser. In reaching liquidity decisions, the 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 the nature of the marketplace in which it trades (*e.g.,* the time needed to dispose of the security, the method of soliciting offers and the mechanics of transfer).

[27] Commercial paper consists of short-term, promissory notes issued by banks, corporations and other entities to finance short-term credit needs. These securities generally are discounted but sometimes may be interest bearing.

[28] *See* NYSE Arca Equities Rule 5.2(j)(3), Commentary .02 governing fixed income based Investment Company Units. Each of the Funds' Portfolios will meet the following requirements of Rule 5.2(j)(3), Commentary .02(a): (i) Components that in the aggregate account for at least 75% of the weight of the index or portfolio must each have a minimum original principal amount outstanding of $100 million or more (Rule 5.2(j)(3), Commentary.02(a)(2)); (ii) no component fixed-income security (excluding Treasury Securities and government-sponsored entity securities) will represent more than 30% of the weight of the index or portfolio, and the five highest weighted component fixed-income securities will not in the aggregate account for more than 65% of the weight of the index or portfolio (Rule 5.2(j)(3), Commentary.02(a)(4)); and (iii) an underlying index or portfolio (excluding exempted securities) must include securities from a minimum of 13 non-affiliated issuers (Rule 5.2(j)(3), Commentary.02(a)(5)).

[29] For each of the Funds, ETPs include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Index-Linked Securities (as described in NYSE Arca Equities Rule 5.2(j)(6)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (as described in NYSE Arca Equities Rule 8.201); Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202); Commodity Index Trust Shares (as described in NYSE Arca Equities Rule 8.203); Trust Units (as described in NYSE Arca Equities Rule 8.500); Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600), and

registered under the 1940 Act that seek to track the performance of a market index (''Underlying ETFs'') and exchange traded notes (''ETNs'').[30]

Each Portfolio may invest in one or more ETPs that are qualified publicly traded partnerships (''QPTPs'') and whose principal activities are the buying and selling of commodities or options, futures, or forwards with respect to commodities.[31] A QPTP is an entity that is treated as a partnership for federal income tax purposes, subject to certain requirements. If such an ETP fails to qualify as a QPTP, the income generated from the Portfolio's investment in the ETP may not comply with certain income tests necessary for the Portfolio to qualify as a regulated investment company under Subchapter M of the Internal Revenue Code.[32]

According to the Registration Statement, each Portfolio may invest in preferred securities. Preferred securities pay fixed or adjustable rate dividends to investors, and have ''preference'' over common stock in the payment of dividends and the liquidation of a company's assets. The market value of preferred securities may be affected by favorable and unfavorable changes impacting companies in the utilities and financial services sectors, which are prominent issuers of preferred securities, and by actual and anticipated changes in tax laws.

Each Portfolio may invest in convertible securities. Convertible securities are bonds, debentures, notes, preferred stocks or other securities that may be converted or exchanged (by the holder or by the issuer) into shares of the underlying common stock (or cash or securities of equivalent value) at a stated exchange ratio. A convertible security may also be called for redemption or conversion by the issuer after a particular date and under certain circumstances (including a specified price) established upon issue.

Each Portfolio may invest in high yield debt securities.

Each Portfolio may invest in Variable Rate Demand Obligations (''VRDO''). VRDOs are short-term tax exempt fixed income instruments whose yield is reset on a periodic basis. VRDO securities tend to be issued with long maturities of up to 30 or 40 years; however, they are considered short-term instruments because they include a put feature which coincides with the periodic yield reset.

The Portfolios may invest in inflation-protected public obligations, commonly known as ''TIPS'', of the U.S. Treasury, as well as TIPS of major governments and emerging market countries, excluding the United States. TIPS are a type of security issued by a government that are designed to provide inflation protection to investors. TIPS are income-generating instruments whose interest and principal payments are adjusted for inflation. The inflation adjustment, which is typically applied monthly to the principal of the bond, follows a designated inflation index, such as the Consumer Price Index. A fixed coupon rate is applied to the inflation-adjusted principal so that as inflation rises or falls, both the principal value and the interest payments will increase or decrease.

Each Portfolio may invest a portion of its assets in Build America Bonds. Build America Bonds offer an alternative form of financing to state and local governments whose primary means for accessing the capital markets has historically been through the issuance of tax-free municipal bonds. The Build America Bond program allows state and local governments to issue taxable bonds for capital projects and to receive a direct federal subsidy payment from the Treasury Department for a portion of their borrowing costs.[33]

The Portfolios may seek to obtain exposure to U.S. agency mortgage pass-through securities through the use of ''to-be-announced'' or ''TBA transactions.'' ''TBA'' refers to a commonly used mechanism for the forward settlement of U.S. agency mortgage pass-through securities, and not to a separate type of mortgage-backed security. Most transactions in mortgage pass-through securities occur through the use of TBA transactions.

Each Portfolio may invest in repurchase agreements with commercial banks, brokers or dealers to generate income from its excess cash balances. A repurchase agreement is an agreement under which a fund acquires a financial instrument (*e.g.,* a security issued by the U.S. government or an agency thereof, a banker's acceptance or a certificate of deposit) from a seller, subject to resale to the seller at an agreed upon price and date (normally, the next business. A repurchase agreement may be considered a loan collateralized by securities. The resale price reflects an agreed upon interest rate effective for the period the instrument is held by a fund and is unrelated to the interest rate on the underlying instrument.

Each Portfolio may invest in sovereign debt which may be denominated in local currencies. Sovereign debt obligations are issued or guaranteed by foreign governments or their agencies. Sovereign debt may be in the form of conventional securities or other types of debt instruments such as loans or loan participations. Governmental entities responsible for repayment of the debt may be unable or unwilling to repay principal and pay interest when due, and may require renegotiation or reschedule of debt payments. In addition, prospects for repayment of principal and payment of interest may depend on political as well as economic factors.

Each Portfolio may invest in foreign currency transactions on a spot (cash) basis and currency forwards for hedging or trade settlement purposes.

Each Portfolio may enter into reverse repurchase agreements, which involve the sale of securities with an agreement to repurchase the securities at an agreed-upon price, date and interest payment and have the characteristics of borrowing.

Each Portfolio may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser,[34] master demand notes, privately-issued securities (which, for example, can be Rule 144A securities), loans and loan participations. Each Portfolio will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will 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 each Fund's (indirectly through its

closed-end funds. The ETPs all will be listed and traded in the U.S. on registered exchanges. While a Fund may invest in inverse ETPs, a Fund will not invest in leveraged (*e.g.,* 2X or 3X) or leveraged inverse ETPs.

[30] ETNs are debt obligations of investment banks which are traded on exchanges and the returns of which are linked to the performance of reference assets, including market indexes. In addition to trading ETNs on exchanges, investors may redeem ETNs directly with the issuer on a weekly basis, typically in a minimum amount of 50,000 units, or hold the ETNs until maturity.

[31] Examples of such entities are the PowerShares DB Energy Fund, PowerShares DB Oil Fund, PowerShares DB Precious Metals Fund, PowerShares DB Gold Fund, PowerShares DB Silver Fund, PowerShares DB Base Metals Fund, and PowerShares DB Agriculture Fund, which are listed and traded on the Exchange pursuant to NYSE Arca Equities Rule 8.200.

[32] 26 U.S.C. 851 *et seq.*

[33] Issuance of Build America Bonds ceased on December 31, 2010. The Build America Bonds outstanding continue to be eligible for the federal interest rate subsidy, which continues for the life of the Build America Bonds; however, no bonds issued following expiration of the Build America Bond program are eligible for the federal tax subsidy.

[34] *See* note 26, *supra.*

respective Portfolio) net assets are held in illiquid securities. Illiquid securities 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.[35]

Each Portfolio will be classified as a ''non-diversified'' investment company under the 1940 Act [36] and will not concentrate its investments in any particular industry or sector.[37]

The Portfolios intend to qualify for and to elect treatment as a separate regulated investment company (''RIC'') under Subchapter M of the Internal Revenue Code.[38]

In extreme situations or market conditions,[39] a Fund may (either directly or through the corresponding Portfolio) temporarily depart from its normal investment policies and strategies provided that the alternative is consistent with the Fund's investment objective and is in the best interest of the Fund. For example, a Portfolio may hold a higher than normal proportion of its assets in cash in times of extreme market stress.

Except for ETPs that may hold non-U.S. equity issues, the Funds and the Portfolios will not otherwise invest in non-U.S equity issues. Neither the Funds nor the Portfolios will invest in options contracts, futures contracts, or swap agreements.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600. The Exchange represents that, for initial and/or continued listing, the Funds will be in compliance with Rule 10A–3 [40] under the Act, as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares for each Fund will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share for each Fund will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. Each Fund's investments will be consistent with its respective investment objective and will not be used to enhance leverage.

Master-Feeder Structure of the Funds

The Funds are intended to be managed in a ''master-feeder'' structure, under which each Fund invests substantially all of its assets in a corresponding Portfolio (*i.e.,* a ''master fund''), which is a separate mutual fund registered under the 1940 Act that has an identical investment objective. As a result, each Fund (*i.e.,* a ''feeder fund'') has an indirect interest in all of the securities and other assets owned by the corresponding Portfolio. Because of this indirect interest, each Fund's investment returns should be the same as those of the corresponding Portfolio, adjusted for the expenses of the Fund. In extraordinary instances, each Fund reserves the right to make direct investments in securities.

The Adviser will manage the investments of each Portfolio. Under the master-feeder arrangement, and pursuant to the Investment Advisory Agreement between the Adviser and the Trust, investment advisory fees charged at the Portfolio level are deducted from the advisory fees charged at the Fund level. This arrangement avoids a ''layering'' of fees, *e.g.,* a Fund's total annual operating expenses would be no higher as a result of investing in a master-feeder arrangement than they would be if the Fund pursued its investment objectives directly. In addition, each Fund may discontinue investing through the master-feeder arrangement and pursue its investment objectives directly if the Trust's Board determines that doing so would be in the best interests of shareholders.

Net Asset Value

According to the Registration Statement, each Fund will calculate net asset value (''NAV'') using the NAV of the respective Portfolio. NAV per Share for each Portfolio will be computed by dividing the value of the net assets of the Portfolio (*i.e.,* the value of its total assets less total liabilities) by the total number of Shares outstanding, rounded to the nearest cent. Expenses and fees, including the management fees, will be accrued daily and taken into account for purposes of determining NAV. The NAV of a Portfolio will be calculated by the Custodian and determined at the close of the regular trading session on the New York Stock Exchange (''NYSE'') (ordinarily 4:00 p.m. Eastern time (''E.T.'') on each day that such exchange is open, provided that fixed-income assets may be valued as of the announced closing time for trading in fixed-income instruments on any day that the Securities Industry and Financial Markets Association (or applicable exchange or market on which a Portfolio's investments are traded) announces an early closing time. Creation/redemption order cut-off times may also be earlier on such days.

In calculating a Portfolio's NAV per Share, the Portfolio's investments are generally valued using market valuations. A market valuation generally means a valuation (i) obtained from an exchange, a pricing service, or a major market maker (or dealer), (ii) based on a price quotation or other equivalent indication of value supplied by an exchange, a pricing service, or a major market maker (or dealer) or (iii) based on amortized cost. In the case of shares of other funds (*e.g.,* mutual funds and money market funds) that are not traded on an exchange, a market valuation means such fund's published NAV per share. The Adviser may use various pricing services, or discontinue the use of any pricing service, as approved by the Board of Trustees of the SSgA Master Trust from time to time. A price obtained from a pricing service based on such pricing service's valuation matrix may be considered a market valuation. Any assets or liabilities denominated in currencies other than the U.S. dollar will be converted into U.S. dollars at the current market rates on the date of valuation as quoted by one or more sources.

In the event that current market valuations are not readily available or such valuations do not reflect current market value, the SSgA Master Trust's procedures require the Pricing and Investment Committee to determine a security's fair value if a market price is not readily available in accordance with the 1940 Act. In determining such value the Pricing and Investment Committee may consider, among other things, (i)

[35] 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 1933 Act).

[36] The diversification standard is set forth in Section 5(b)(1) of the 1940 Act.

[37] *See* Form N–1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. *See, e.g.,* Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975).

[38] 26 U.S.C. 851 *et seq.*

[39] Such situations and conditions include, but are not limited to, trading halts in the fixed income markets or disruptions in 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.

[40] 17 CFR 240.10A–3.

price comparisons among multiple sources, (ii) a review of corporate actions and news events, and (iii) a review of relevant financial indicators (*e.g.,* movement in interest rates, market indices, and prices from the Portfolios' index providers).[41] In these cases, the Portfolio's NAV may reflect certain portfolio securities' fair values rather than their market prices. Fair value pricing involves subjective judgments and it is possible that the fair value determination for a security is materially different than the value that could be realized upon the sale of the security.

Creation and Redemption of Shares

According to the Registration Statement, each Fund will issue and redeem Shares only in Creation Units at the NAV next determined after receipt of an order on a continuous basis every business day. The NAV of a Fund will be determined once each business day, normally as of the closing of the regular trading session on the NYSE (normally 4:00 p.m., E.T.). Creation Unit sizes are 50,000 Shares per Creation Unit. The Creation Unit size for a Fund may change.

The consideration for purchase of a Creation Unit of a Fund generally will consist of either (i) the in-kind deposit of a designated portfolio of securities (the ''Deposit Securities'') per each Creation Unit and the Cash Component (defined below), computed as described below or (ii) the cash value of the Deposit Securities (''Deposit Cash'') and the ''Cash Component,'' computed as described below. When accepting purchases of Creation Units for cash, a Fund may incur additional costs associated with the acquisition of Deposit Securities that would otherwise be provided by an in-kind purchaser.

Together, the Deposit Securities or Deposit Cash, as applicable, and the Cash Component constitute the ''Fund Deposit,'' which represents the minimum initial and subsequent investment amount for a Creation Unit of any Fund. The ''Cash Component'' is an amount equal to the difference between the NAV of the Shares (per Creation Unit) and the market value of the Deposit Securities or Deposit Cash, as applicable. The Cash Component serves the function of compensating for any differences between the NAV per Creation Unit and the market value of the Deposit Securities or Deposit Cash, as applicable.

The Custodian, through the National Securities Clearing Corporation (''NSCC''), will make available on each business day, immediately prior to the opening of business on the Exchange (currently 9:30 a.m., E.T.), the list of the names and the required number of shares, if applicable, of each Deposit Security or the required amount of Deposit Cash, as applicable, to be included in the current Fund Deposit (based on information at the end of the previous business day) for a Fund. Such Fund Deposit is subject to any applicable adjustments as described below, in order to effect purchases of Creation Units of a Fund until such time as the next-announced composition of the Deposit Securities or the required amount of Deposit Cash, as applicable, is made available.

The Trust reserves the right to permit or require the substitution of an amount of cash (*i.e.,* a ''cash in lieu'' amount) to be added to the Cash Component to replace any Deposit Security, including, without limitation, situations where the Deposit Security: (i) may not be available in sufficient quantity for delivery, (ii) may not be eligible for transfer through the systems of the Depository Trust Company (''DTC'') for corporate securities and municipal securities or the Federal Reserve System for U.S. Treasury securities; (iii) may not be eligible for trading by an ''Authorized Participant'' (as defined in the Registration Statement) or the investor for which it is acting; (iv) would be restricted under the securities laws or where the delivery of the Deposit Security to the Authorized Participant would result in the disposition of the Deposit Security by the Authorized Participant becoming restricted under the securities laws, or (v) in certain other situations (collectively, ''non-standard orders''). The Trust also reserves the right to permit or require the substitution of Deposit Securities in lieu of Deposit Cash.

Shares may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form by a Fund through the Transfer Agent and only on a business day.

With respect to each Fund, the Custodian, through the NSCC, will make available immediately prior to the opening of business on the Exchange on each business day, the list of the names and quantities of each Fund's portfolio securities that will be applicable (subject to possible amendment or correction) to redemption requests received in proper form on that day (''Fund Securities''). Fund Securities received on redemption may not be identical to Deposit Securities.

Redemption proceeds for a Creation Unit will be paid either in-kind or in cash or a combination thereof, as determined by the Trust. With respect to in-kind redemptions of a Fund, redemption proceeds for a Creation Unit will consist of Fund Securities as announced by the Custodian on the business day of the request for redemption received in proper form plus cash in an amount equal to the difference between the NAV of the Shares being redeemed, as next determined after a receipt of a request in proper form, and the value of the Fund Securities (the ''Cash Redemption Amount''), less a fixed redemption transaction fee and any applicable additional variable charge as set forth below. In the event that the Fund Securities have a value greater than the NAV of the Shares, a compensating cash payment equal to the differential will be required to be made by or through an Authorized Participant by the redeeming shareholder. Notwithstanding the foregoing, at the Trust's discretion, an Authorized Participant may receive the corresponding cash value of the securities in lieu of the in-kind securities value representing one or more Fund Securities.

Availability of Information

The Funds' Web site (*www.spdrs.com*), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Funds that may be downloaded. The Funds' Web site will include additional quantitative information updated on a daily basis, including, for the Funds, (1) daily trading volume, the prior business day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV (the ''Bid/Ask Price''),[42] and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Adviser will disclose on its Web site the Disclosed Portfolio as

[41] The SSgA Master Trust's Pricing and Investment Committee has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Portfolios and the Funds.

[42] The Bid/Ask Price of the Funds will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Funds' NAV. The records relating to Bid/Ask Prices will be retained by the Funds and their service providers.

defined in NYSE Arca Equities Rule 8.600(c)(2) that will form the basis for the Funds' calculation of NAV at the end of the business day.[43]

On a daily basis, the Adviser will disclose for each portfolio security and other financial instrument of the Funds and of the Portfolios the following information on the Funds' Web site: ticker symbol (if applicable), name of security and financial instrument, number of shares, if applicable, or dollar value of financial instruments and securities held in the portfolio, and percentage weighting of the security and financial instrument in the portfolio. The Web site information will be publicly available at no charge.

In addition, a basket composition file, which includes the security names and share quantities, if applicable, required to be delivered in exchange for a Fund's Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the NYSE via NSCC. The basket represents one Creation Unit of each Fund.

Investors can also obtain the Trust's Statement of Additional Information (''SAI''), the Funds' Shareholder Reports, and the Trust's Form N–CSR and Form N–SAR, filed twice a year. The Trust's SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's Web site at *www.sec.gov.* Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line and, for the ETPs, will be available from the national securities exchange on which they are listed.

Every fifteen seconds during NYSE Arca Core Trading Session, an indicative optimized portfolio value (''IOPV'') relating to each Fund will be widely disseminated by one or more major market data vendors.[44] The IOPV is the Portfolio Indicative Value as defined in NYSE Arca Equities Rule 8.600 (c)(3).[45] The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Funds and of the Portfolios on a daily basis and to provide a close estimate of that value throughout the trading day. The intra-day, closing and settlement prices of the Portfolio securities and other assets will also be readily available from the national securities exchanges trading such securities, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters.

Additional information regarding the Trust and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions and taxes is included in the Registration Statement. All terms relating to the Funds that are referred to, but not defined in, this proposed rule change are defined in the Registration Statement.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Funds.[46] Trading in Shares of the Funds will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Funds; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of a Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4:00 a.m. to 8:00 p.m. E.T. in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, Commentary .03, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by the Financial Industry Regulatory Authority (''FINRA'') on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[47] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the Intermarket Surveillance Group (''ISG'') and FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares from markets and other

[43] Under accounting procedures followed by the Funds, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Accordingly, the Funds will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[44] The IOPV calculations are estimates of the value of the Funds' NAV per Share using market data converted into U.S. dollars at the current currency rates. The IOPV price is based on quotes and closing prices from the securities' local market and may not reflect events that occur subsequent to the local market's close. Premiums and discounts between the IOPV and the market price may occur. This should not be viewed as a ''real-time'' update of the NAV per Share of the Funds, which is calculated only once a day.

[45] Currently, it is the Exchange's understanding that several major market data vendors display and/or make widely available IOPVs taken from CTA or other data feeds.

[46] *See* NYSE Arca Equities Rule 7.12.

[47] FINRA surveils trading on the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[48]

All equity securities held by the Funds or Portfolios, including shares of ETPs, will trade on U.S. national securities exchanges, all of which are members of ISG.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its Equity Trading Permit Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Funds are subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. E.T. each trading day.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[49] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

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 NYSE Arca Equities Rule 8.600. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG and FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Adviser has implemented a ''fire wall'' with respect to its affiliated broker-dealer regarding access to information concerning the composition and/or changes to the Funds' portfolios. In addition, the Trust's Pricing and Investment Committee has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Portfolios and the Funds. The Adviser will invest, under normal circumstances, at least 80% of the each Portfolio's net assets (plus the amount of borrowings for investment purposes) in a diversified portfolio of U.S. dollar-denominated investment grade fixed income securities. Non-agency residential mortgage-backed and commercial mortgage-backed investments each will be limited to 10% for each of the Portfolios. Each Fund's Portfolio will meet certain criteria for index-based, fixed income exchange-traded funds contained in NYSEArca Equities Rule 5.2(j)(3), Commentary .02, as described above. FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG and FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. The ETPs held by the Funds will be traded on U.S. national securities exchanges and will be subject to the rules of such exchanges, as approved by the Commission. Except for ETPs that may hold non-U.S. equity issues, the Funds will not otherwise invest in non-U.S. equity issues. Neither the Funds nor the Portfolios will invest in options contracts, futures contracts, or swap agreements. Each Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser, master demand notes, privately-issued securities, and loans and loan participations. Each Fund's investments will be consistent with its respective investment objective and will not be used to enhance leverage.

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 Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information is publicly available regarding the Funds and the Shares, thereby promoting market transparency. Moreover, the IOPV will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Adviser will disclose on its Web site the Disclosed Portfolio that will form the basis for the Funds' calculation of NAV at the end of the business day. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and quotation and last sale information will be available via the CTA high-speed line. The Web site for the Funds will include a form of the prospectus for the Funds and additional data relating to NAV and other applicable quantitative information. Moreover, prior to the commencement of trading, the Exchange

[48] For a list of the current members of ISG, see *www.isgportal.org.* The Exchange notes that not all components of the Disclosed Portfolio for each Fund and Portfolio may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[49] 15 U.S.C. 78f(b)(5).

will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Trading in Shares of the Funds will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Funds may be halted. In addition, as noted above, investors will have ready access to information regarding the Funds' holdings, the IOPV, the Disclosed Portfolio, and quotation and last sale information for the Shares.

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 it will facilitate the listing and trading of additional types of actively-managed exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange may obtain information regarding trading in the Shares from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the Funds' holdings, the IOPV, the Disclosed Portfolio, and quotation and last sale information for the Shares.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of additional types of actively-managed exchange-traded products that hold fixed income securities and will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2013–71 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca-2013–71. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca-2013–71 and should be submitted on or before August 14, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[50]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–17722 Filed 7–23–13; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Delegation of Authority No. 363]

Delegation by the Secretary of State to the Assistant Secretary for European and Eurasian Affairs; U.S. Participation in the ''Milan Expo 2015''

By virtue of the authority vested in me as Secretary of State, including Section 1 of the State Department Basic Authorities Act, as amended (22 U.S.C. 2651a); the transfer provisions of the Foreign Affairs Reform and Restructuring Act of 1998, codified in 22 U.S.C. 6532; and pursuant to Executive Order 12048, as amended, I hereby delegate to the Assistant Secretary of State for European and Eurasian Affairs, to the extent authorized by law, the authority of the President under Section 102(a)(3) of the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–286, to provide for U.S. participation in the ''Milan Expo 2015.''

Any act, executive order, regulation, or procedure subject to, or affected by, this delegation shall be deemed to be such act, executive order, regulation, or procedure as amended from time to time.

Notwithstanding this delegation of authority, the Secretary, the Deputy Secretary, the Deputy Secretary for Management and Resources, and the Under Secretary for Political Affairs may at any time exercise any authority or function delegated by this delegation of authority.

This delegation of authority does not rescind, supersede, or in any way affect the validity of any other delegation of authority. This includes Delegation of

[50] 17 CFR 200.30–3(a)(12).

Authority 234, dated October 1, 1999, which remains in effect.

This delegation of authority shall be published in the **Federal Register**.

Dated: July 15, 2013.

John F. Kerry,

Secretary of State.

[FR Doc. 2013–17802 Filed 7–23–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No: FAA–2013–0649]

Aviation Rulemaking Advisory Committee (ARAC) Airman Testing Standards and Training Working Group (ATSTWG)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Request for Comment

SUMMARY: This notice announces the availability of additional draft Airman Certification Standards (ACS) documents developed by the ATSTWG for the authorized instructor certificate, the private pilot certificate and the instrument rating. These documents are available for public review, download, and comment.

DATES: Send comments on or before August 23, 2013.

ADDRESSES: Send comments identified by docket number FAA–2013–0649 using any of the following methods:

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

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

• *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Fax:* Fax comments to Docket Operations at (202) 493–2251.

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

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Van L. Kerns, Manager, Regulatory Support Division, FAA Flight Standards Service, AFS 600, FAA Mike Monroney Aeronautical Center, P.O. Box 25082, Oklahoma City, OK 73125; telephone (405) 954–4431, email *van.l.kerns@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On August 30, 2012, the ARAC Executive Committee accepted the FAA's assignment of a new task arising from recommendations of the Airman Testing Standards and Training Aviation Rulemaking Committee (ARC). The ARC recommended ways to ensure that the FAA's airman testing and training materials better support reduction of fatal general aviation accidents. The new task instructed the ARAC to integrate aeronautical knowledge and flight proficiency requirements for the private pilot and flight instructor certificates and the instrument rating into a single ACS document for each type of certificate and rating; to develop a detailed proposal to realign FAA training handbooks with the ACS documents; and to propose knowledge test item bank questions consistent with the integrated ACS documents and the principles set forth in the ARC's recommendations.

The FAA announced the ARAC's acceptance of this task through a **Federal Register** Notice published on September 12, 2012 [77 FR 56251]. This Notice described the task elements and solicited participants for the ATSTWG, which subsequently formed and began its work in November 2012.

Consistent with the first part of this tasking, the ATSTWG developed draft ACS documents that align the aeronautical knowledge testing standards with the flight proficiency standards set out in the existing Practical Test Standards (PTS). In addition to supporting the FAA's effort to improve the relevance, reliability, validity, and effectiveness of aeronautical testing and training materials, the draft ACS documents support the FAA's goal of reducing fatal general aviation accidents by incorporating task-specific risk management considerations into each Area of Operation.

The ATSTWG completed its initial work on the ACS for the private pilot certificate and the instrument rating in April, 2013. At the request of the ATSTWG, the FAA made these documents available for public comment through docket number FAA–2013–0316. The comment period for the notice published on April 24, 2013 (78 FR 24289) closed May 24, 2013. Also at the request of the ATSTWG, the FAA reopened the comment period until July 8, 2013.

During these periods, the ATSTWG received more than 300 comments and questions on the draft ACS for the private pilot certificate and the instrument rating. The ATSTWG has used these comments to inform and refine its continuing work on this project, and has consequently asked the FAA to make the revised versions of these documents available for on additional period of public review and comment before it completes its work in September, 2013.

In addition, the ATSTWG has completed its initial draft of the authorized instructor ACS document. The purpose of the authorized instructor ACS is to define the acceptable performance standards for instructional knowledge and skill, including the Fundamentals of Instructing (FOI) concepts listed in 14 CFR part 61. Consistent with its desire for comments to help refine its work, the ATSTWG has asked the FAA to make this document available for public comment as well.

In making this document available, the ATSTWG wishes to note that while the draft authorized instructor ACS follows the overall conceptual framework developed for the private pilot ACS and the instrument rating ACS, its construction reflects fundamental differences between the family of pilot certificates/ratings and the instructor certificate. The core of the authorized instructor ACS addresses practical application of the instructional concepts and techniques presented in the traditional FOI. The authorized instructor ACS uses appendices to define the acceptable standards for knowledge, skill, and risk management in the aeronautical proficiency tasks unique to a particular instructor certificate or rating.

The ATSTWG also wishes to emphasize that the authorized instructor ACS is not intended to be a stand-alone document. Rather, it is intended to be used in conjunction with the pilot certificate level or rating ACS for which the instructor-applicant seeks authorization to provide instruction. Therefore, in addition to mastery of the knowledge and skills defined in the authorized instructor ACS, the instructor-applicant must demonstrate instructional competence for Tasks in the ACS for the appropriate certificate level or rating, to include analyzing and correcting common learner errors.

The ATSTWG continues work to complete its remaining assignments. These include developing a detailed proposal to realign and, as appropriate, streamline and consolidate existing FAA guidance material (e.g., handbooks) with each integrated ACS document; and to propose methodologies to ensure that knowledge test item bank questions are consistent with both the ACS documents and the test question development principles set forth in the ARC's recommendations.

The ACS documents are designed as the foundation for transitioning to a more integrated and systematic approach to airman certification testing and training. To accomplish this objective and achieve its overall safety goals, the ACS documents support the safety management system (SMS) framework. SMS methodology provides a systematic approach to achieving acceptable levels of safety risk. The ATSTWG is constructing ACS, associated guidance, and test item bank question components of the airman certification system around the four functional components of SMS:

- *Safety Policy* that demonstrates FAA senior management commitment to continually improve safety through enhancements to the airman certification testing and training system; specifically, better integration of the aeronautical knowledge, flight proficiency, and risk management components of the airman certification system;
- *Safety Risk Management* processes that create a structured means of safety risk management decision making to identify, assess, and determine acceptable level of risk associated with regulatory changes, safety recommendations, or other factors requiring modification of airman testing and training materials;
- *Safety Assurance* processes which allow increased confidence on the part of industry and FAA stakeholders in risk controls through a continual review of FAA products and the systematic, prompt and appropriate incorporation of changes arising from new regulations, data analysis, and safety recommendations; and
- *Safety Promotion* framework to support a positive safety culture in the form of training and ongoing engagement with both external stakeholders (e.g., the aviation training industry) and FAA policy divisions.

Time permitting, and given the foundational nature of the ACS documents and their importance in the ongoing evolution of the FAA's airman certification testing and training system, the ATSTWG wishes to make subsequent revised draft ACS documents for the private pilot certificate and the instrument rating, and of its current initial draft of the authorized instructor ACS, available to the public for one additional period of review and comment before it completes its work in September 2013. The ATSTWG would use the comments it receives to complete its work on this project and to develop its final report and recommendations.

Issued in Washington, DC on July 19, 2013.

Lirio Liu,

Designated Federal Officer, Aviation Rulemaking Advisory Committee.

[FR Doc. 2013–17782 Filed 7–23–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2013–0045]

Reports, Forms and Record Keeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), this notice announces that the Information Collection Request (ICR) abstracted below will be forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected burden. The **Federal Register** Notice with a 60-day comment period was published on April 18, 2013 (78 FR 23330). No comments were received.

Comments: Comments should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention NHTSA Desk Officer.

Type of Request: Extension of a currently approved collection.

Form Number: This collection of information uses no standard forms.

DATES: Comments must be submitted on or before August 23, 2013.

FOR FURTHER INFORMATION CONTACT: John Piazza, National Highway Traffic Safety Administration, Office of the Chief Counsel (NCC–111), (202) 366–9511, 1200 New Jersey Avenue SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: Criminal Penalty Safe Harbor Provision.

OMB Control Number: 2127–0609.

Frequency: We believe that there will be very few criminal prosecutions under 49 U.S.C. 30170, given the lack of prosecutions under the statute to date. Accordingly, it is not likely to be a substantial motivating force for a submission of a corrected report in response to an agency request for information. See Summary of the Collection of Information below. Based on our experience to date, we estimate that no more than one (1) person per year would be subject to this collection of information, and we do not anticipate receiving more than one report a year from any particular person.

Affected Public: This collection of information would apply to any person who seeks a ''safe harbor'' from potential criminal liability under 49 U.S.C. 30170. Thus, the collection of information could apply to the manufacturers, any officers or employees thereof, and other persons who respond or have a duty to respond to an information provision requirement pursuant to 49 U.S.C. 30166 or a regulation, requirement, request or order issued thereunder.

Abstract: NHTSA has published a final rule related to ''reasonable time'' and sufficient manner of ''correction,'' as they apply to the safe harbor from criminal penalties, as required by Section 5 of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act (Pub. L. 106–414), which was enacted on November 1, 2000. 65 FR 38380 (July 24, 2001).

Estimated Annual Burden: Using the above estimate of one (1) affected person a year, with an estimated two (2) hours of preparation to collect and provide the information, at an assumed rate of $26.70 an hour, the annual, estimated cost of collecting and preparing the information necessary for one complete ''safe harbor'' correction is $53.40. Adding in a postage cost of $0.46 (one report at a cost of 46 cents to mail each one), we estimate that it will cost $53.86 a year for persons to prepare and submit the information necessary to satisfy the safe harbor provision of 49 U.S.C. 30170.

Since nothing in this rule would require those persons who submit reports pursuant to this rule to keep copies of any records or reports submitted to us, the cost imposed to keep records would be zero hours and zero costs.

Number of Respondents: We estimate that there will be no more than one per year.

Summary of the Collection of Information: Any person seeking protection from criminal liability under 49 U.S.C. 30170 related to an improper report or failure to report pursuant to 49 U.S.C. 30166, or a regulation, requirement, request or order issued thereunder, is and will be required to report the following information to NHTSA: (1) Each previous improper item of information or document and each failure to report that was required under 49 U.S.C. 30166, or a regulation, requirement, request or order issued thereunder, (2) the specific predicate under which each improper or omitted report should have been provided, and (3) the complete and correct reports, including all information that was improperly submitted or that should have been submitted and all relevant documents that were not previously submitted to NHTSA or, if the person cannot provide this, then a full detailed description of that information or of the content of those documents and the reason why the individual cannot provide them to NHTSA.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention NHTSA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A Comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued in Washington, DC under authority delegated in 49 CFR 1.95.

O. Kevin Vincent,

Chief Counsel.

[FR Doc. 2013–17679 Filed 7–23–13; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2013–0034]

Notice of Receipt of Petition for Decision that Nonconforming 2004 BMW 760I Passenger Cars are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that nonconforming 2004 BMW 760I passenger cars that were not originally manufactured to comply with all applicable Federal Motor Vehicle Safety Standards (FMVSS) are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified version of the 2004 BMW 760I passenger car) and they are capable of being readily altered to conform to the standards.

DATE: The closing date for comments on the petition is August 23, 2013.

ADDRESSES: Comments should refer to the docket and notice numbers above and be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

How to Read Comments submitted to the Docket: You may read the comments received by Docket Management at the address and times given above. You may also view the documents from the Internet at *http://www.regulations.gov.* Follow the online instructions for accessing the dockets. The docket ID number and title of this notice are shown at the heading of this document notice. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically search the Docket for new material.

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202–366–3151).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. § 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with

NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register.**

U.S. Specs of Havre de Grace, Maryland (Registered Importer R–03–321) has petitioned NHTSA to decide whether nonconforming 2004 BMW 760I passenger cars are eligible for importation into the United States. The vehicles which U.S. Specs believes are substantially similar are 2004 BMW 760I passenger cars that were manufactured for sale in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared non-U.S. certified 2004 BMW 760I passenger cars to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

U.S. Specs submitted information with its petition intended to demonstrate that non-U.S. certified 2004 BMW 760I passenger cars, as originally manufactured, conform to many FMVSS in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards. Specifically, the petitioner claims that non-U.S. certified 2004 BMW 760I passenger cars are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses,* 109 *New Pneumatic Tires,* 113 *Hood Latch System,* 116 *Motor Vehicle Brake Fluids,* 124 *Accelerator Control Systems,* 135 *Light Vehicle Brake Systems,* 202 *Head Restraints,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 207 *Seating Systems,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* and 302 *Flammability of Interior Materials.*

The petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* Recalibration of the speedometer to read in MPH instead of KPH if the speedometer is not already so calibrated; inscription of the word ''BRAKE'' on the brake failure indicator in place of the ECE warning symbol, if the vehicle is not already so equipped.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* Replacement of the headlamps, side marker lamps, and tail lamps with U.S.-model components; installation of a U.S.-model high-mounted stop lamp.

Standard No. 110 *Tire Selection and Rims for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or Less:* Installation of a tire information placard.

Standard No. 111 *Rearview Mirrors:* Replacement of the passenger side rearview mirror with a U.S.-model component or inscription of the required warning statement on the face of that mirror.

Standard No. 114 *Theft Protection and Rollaway Prevention:* Installation of a warning buzzer if the vehicle is not already so equipped or reprogramming the buzzer to comply with the standard.

Standard No. 118 *Power-Operated Window, Partition, and Roof Panel Systems:* Inspection of each vehicle to verify compliance with the standard and reprogramming and/or rewiring the system to meet the standard if it does not already comply.

Standard No. 201 *Occupant Protection in Interior Impact:* Inspection of components subject to this standard and replacement as necessary with U.S.-model components.

Standard No. 206 *Door Locks and Door Retention Components:* Inspection of door lock and retention components and installation of U.S.-model components if the vehicle is not already so equipped.

Standard No. 208 *Occupant Crash Protection:* Installation of a seat belt warning lamp and audible buzzer if the vehicle is not already so equipped; inspection of vehicle to ensure that airbags, control unit, sensors, seatbelts, and knee bolsters bearing U.S.-model part numbers have been installed.

Standard No. 209 *Seat Belt Assemblies:* Inspection of all seat belts and replacement with U.S.-model components if the vehicle is not already so equipped.

Standard No. 225 *Child Restraint Anchorage Systems:* Installation of the U.S.-model restraint anchorage system if the vehicle is not already so equipped.

Standard No. 301 *Fuel System Integrity:* Replacement of fuel system components subject to this standard with U.S.-model components if the vehicle is not already so equipped.

Standard No. 401 *Interior Trunk Release:* Installation of a compliant interior trunk release system.

The petitioner states that a vehicle identification plate must be affixed to the vehicles near the left windshield post if not already present to meet the requirements of 49 CFR Part 565.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above addresses both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Issued on: July 18, 2013.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2013–17787 Filed 7–23–13; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Research and Innovative Technology Administration

Agency Information Collection; Activity Under OMB Review; Confidential Close Call Reporting System

AGENCY: Research & Innovative Technology Administration (RITA), Bureau of Transportation Statistics (BTS), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) described below is being forwarded to the Office of Management and Budget (OMB) for approval for renewal of information collection supporting a multi-year research study that aims at improving rail safety by analyzing information on close calls and other unsafe occurrences in the rail industry. The ICR describes the nature of the information collection. The **Federal Register** notice with a 60-day comment period soliciting comments on the following collection of information was published on May 10, 2013 (78 FR 27479) and the comment period ended on July 10, 2013. The 60-day notice produced no comments.

DATES: Written comments should be submitted by August 23, 2013.

FOR FURTHER INFORMATION CONTACT: Demetra V. Collia, Bureau of Transportation Statistics, Research and Innovative Technology Administration, U.S. Department of Transportation, Office of Advanced Studies, RTS–31, E324–302, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; Phone No. (202) 366–1610; Fax No. (202) 366–3383; email: *demetra.collia@dot.gov*. Office hours are from 8:30 a.m. to 5 p.m., EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Confidential Close Call Reporting System.

Type of Request: Approval to continue to collect information on close calls.

OMB Control Number: 2139–0010.

Affected Public: Workers in the railroad industry.

Number of Respondents: 3,100.

Number of Responses: 365 (annual).

Total Annual Burden: 365.00 hours (average estimate of 20 minutes to complete the C³RS report form and 30–40 minutes to participate in a brief interview.)

Data Confidentiality Provisions: The confidentiality of Close Call data is protected under the BTS confidentiality statute (49 U.S.C. Sec. 6307) and the Confidential Information Protection and Statistical Efficiency Act (CIPSEA) of 2002 (Pub. L. 107–347, Title V). In accordance with these confidentiality statutes, only statistical and non-identifying data will be made publicly available through reports. BTS will not release to the Federal Railroad Administration (FRA) or any other public or private entity any information that might reveal the identity of individuals or organizations mentioned in close call reports without explicit consent of the respondent. Accordingly, only statistical and non-sensitive information will be made available through publications and reports.

Abstract: Collecting data on the nation's transportation system is an important component of BTS's responsibility to the transportation community and is authorized in BTS statutory authority (49 U.S.C. 6307). FRA and BTS share a common interest in promoting rail safety based on better data. To that end, FRA's Office of Research and Development is sponsoring the Confidential Close Call Reporting System (C³RS) Demonstration Project to investigate the effectiveness of such system in improving rail safety.

A close call represents a situation in which an ongoing sequence of events was stopped from developing further, preventing the occurrence of potentially serious safety-related consequences. This might include the following: (1) Events that happen frequently, but have low safety consequences; (2) events that happen infrequently but have the potential for high consequences (e.g., a train in dark territory proceeds beyond its authority); (3) events that are below the FRA reporting threshold (e.g., an event that causes a minor injury); and (4) events that are reportable to FRA but have the potential for a far greater accident than the one reported (e.g., a slow speed collision with minor damage to the equipment and no injuries.)

Employees involved in a close call are asked to provide information about the reported event by filling out a C³RS report form (questionnaire) and participating in a brief interview, as needed. Respondents are asked to provide: (1) Name and contact information; (2) time and location of the close call event; (3) a short description of the event; (4) potential contributing factors to the event; and (5) any other information that might be useful in determining a root cause of such event. In addition, BTS is developing an analytical database containing the reported data and other pertinent information to determine root causes of frequently reported close calls. The database is a valuable tool to railroad carriers and the FRA in their effort to identify safety issues and provide corrective measures before an accident occurs. Also, it provides rail safety researchers with valuable information regarding precursors to safety risks in rail operations and contributes to research and development of intervention programs aimed at preventing occupational accidents and fatalities.

The C³RS demonstration project offers a voluntary, cooperative, non-punitive environment to communicate safety concerns. Through the analysis of close calls the FRA and the railroad community receive information about factors that may contribute to unsafe events and the error recovery mechanisms that prevented an adverse consequence from occurring. Such information is used to develop new training programs, identify root causes of potentially adverse events, assess risk, and allocate resources to address those risks more efficiently.

It is estimated that close call reporting will take no more than one (1) hour (average estimate of 20 minutes to complete the C³RS report form and 20–30 minutes to participate in a brief interview) for a maximum total burden of 365.00 hours (365 reports*60 minutes/60 = 365.00 hours). Reports are submitted when there is a qualifying event (i.e., when an employee experiences a close call or witnesses an unsafe situation) during their work shift. The frequency of such event is estimated to be approximately one per calendar day.

ADDRESSES: The agency seeks public comments on its proposed information collection. Comments should address whether the information will have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street NW., Washington, DC 20503, Attention: BTS Desk Officer.

Issued on: July 18, 2013.

Patricia Hu,

Director, Bureau of Transportation Statistics, Research and Innovative Technology Administration.

[FR Doc. 2013–17684 Filed 7–23–13; 8:45 am]

BILLING CODE 4910–HY–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 98–25

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Automatic Data Processing.

DATES: Written comments should be received on or before September 23, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the revenue procedure should be directed to Martha R. Brinson, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *Martha.R.Brinson@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Automatic Data Processing.

OMB Number: 1545–1595.

Revenue Procedure Number: Revenue Procedure 98–25.

Abstract: Revenue Procedure 98–25 provides taxpayers with comprehensive guidance on requirements for keeping and providing IRS access to electronic tax records. The revenue procedure requires taxpayers to retain electronic, or ''machine-sensible'' records, ''so long as their contents may become material to the administration of the internal revenue laws.'' Such materiality would continue, according to IRS, at least until the period of limitations, including extensions, expires for each tax year.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, not-for-profit institutions, farms, Federal government, and state, local or tribal governments.

Estimated Number of Respondents: 3,000.

Estimated Time Per Respondent: 40 hours.

Estimated Total Annual Burden Hours: 120,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request For Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 17, 2013.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2013–17691 Filed 7–23–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0619]

Inquiry Routing and Information System; Correction

AGENCY: Office of Information and Technology, Department of Veterans Affairs.

ACTION: Notice; correction.

SUMMARY: The Department of Veterans Affairs (VA) published an information collection notice in a **Federal Register** on July 15, 2013 (78 FR 42157), that contained errors. In the SUMMARY section of the notice, VA announced that the Veterans Health Administration (VHA) had submitted the collection of information titled ''Inquiry Routing and Information System (IRIS) to the Office of Management and Budget (OMB) for review and comment. It should have stated that the Office of Information and Technology (OIT) had submitted the collection of information to OMB. Also, at the **AGENCY** heading, VHA was named the sponsoring program office when the sponsoring program office is OIT. Lastly, we have corrected the office title of the **FOR FURTHER INFORMATION CONTACT** person. Those errors are corrected by this notice.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, at (202) 632–7492.

Correction

In FR Doc. 2013–16773, published on July 15, 2013, at 78FR42157, make the following corrections.

On page 42157, in the first column, at the **AGENCY** heading, remove ''Veterans Health Administration'' and add, in its place, ''Office of Information and Technology'', in the **SUMMARY**, second column, remove Veterans Health Administration (VHA), and add, in its place, ''Office of Information and Technology (OIT)'', and at FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT, removed ''Records Management Service'' and add, in its place ''Enterprise Records Service''.

Robert C. McFetridge,

Director, Office of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

[FR Doc. 2013–17749 Filed 7–23–13; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–NEW (Conduct the Point-of-Care Research Questionnaire)]

Proposed Information Collection (Conduct the Point-of-Care Research Questionnaire); Activities Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Health Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before August 23, 2013.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–NEW (Conduct the Point of Care Research Questionnaire)'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632–7492 or email: *crystal.rennie@va.gov*. Please refer to ''OMB Control No. 2900–NEW (Conduct the Point-of-Care Research Questionnaire).''

SUPPLEMENTARY INFORMATION:

Title: Conduct the Point-of-Care Research Questionnaire, VA Form 10–10069.

OMB Control Number: 2900–NEW (Conduct the Point-of-Care Research Questionnaire)

Type of Review: New collection.

Abstract: The data collected on VA Form 10–10069 will be used as a grant to evaluate patient and provider attitudes and willingness to participate in Point-of-Care Research (POC–R). POC–R is an intermediary approach to bridge the gap between clinical trials and observation studies. The POC–R provides a potential mechanism for improving the breadth and significant of clinical research programs in VA. The objectives of this study are twofold: (1) identify the barriers and facilitators to adoption of a Point-of-care research innovation program by assessing the perceptions and attitudes of patients; and (2) produce guidelines for VHA regarding implementation of POC–R.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on February 7, 2013 at pages 9108–9109.

Affected Public: Individuals or Households.

Estimated Annual Burden: 2,000 hours.

Estimated Average Burden Per Respondent: 15 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 8,000.

Dated: July 18, 2013.

By direction of the Secretary.

Crystal Rennie,

VA Clearance Officer, U.S. Department of Veterans Affairs.

[FR Doc. 2013–17709 Filed 7–23–13; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Proposed Information Collection (Open Burn Pit Registry Airborne Hazard Self-Assessment Questionnaire) Activity; Extension of Comment Period

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice; Extension of Comment Period.

SUMMARY: The Veterans Health Administration (VHA), Department of Veterans Affairs (VA), is extending the comment period for the notice published June 5, 2013 (78 FR 33894), and posting the draft questionnaire that was the subject of that notice, on the VA's Web site.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before August 20, 2013.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) at *www.Regulations.gov;* or to Cynthia Harvey-Pryor, Veterans Health Administration (10B4), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email: *cynthia.harvey-pryor@va.gov.*

Please refer to ''OMB Control No. 2900—NEW, Open Burn Pit Registry Airborne Hazard Self-Assessment Questionnaire,'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor at (202) 461–5870 or Fax (202) 495–5397.

SUPPLEMENTARY INFORMATION: On June 5, 2013, VA published a notice in the **Federal Register** (78 FR 33894) (FR Doc. 2013–13224) announcing an opportunity for public comment on a proposed collection of certain information by VA. This notice solicited comments on a draft questionnaire to collect information to ascertain and monitor the health effects of service members' exposure to toxic airborne chemicals and fumes caused by open burn pits. The notice listed a VA point of contact that provided the draft questionnaire to members of the public during the comment period.

In response to a suggestion from several Members of Congress, VA has decided to post the draft questionnaire on our Web site at *http://www.publichealth.va.gov/docs/exposures/draft-questionnaire-burn-pit-registry.pdf and http://www.publichealth.va.gov/docs/exposures/justification-burn-pit-registry.pdf* and is extending the comment period for an additional 15 days, to August 20, 2013.

Dated: July 19, 2013.

By direction of the Secretary.

Crystal Rennie,

Clearance Officer, Enterprise Records Service, Office of Information and Technology, Department of Veterans Affairs.

[FR Doc. 2013–17784 Filed 7–23–13; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–NEW]

Proposed Information Collection (Wrist Conditions Disability Benefits Questionnaire) Activity: Withdrawal

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice; withdrawal.

SUMMARY: The Department of Veterans Affairs (VA) published a notice in a **Federal Register** on June 17, 2013 (78 FR 36307), inviting the public to comment on a proposed information collection titled ''Wrist Conditions Disability Benefits Questionnaire, VA Form 21–0960M–16.'' On June 18, 2013 (78 FR 36643), VA inadvertently published an identical notice for the same information collection. This document corrects that error by withdrawing the FR notice that published on June 18, 2013 (FR Doc 2013–14412).

DATES: Written comments and recommendations on the proposed collection of information notice that published on June 17, 2013 (78 FR 36307) should be received on or before August 16, 2013.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, at (202) 632–7492.

FR Doc. 2013–14412, published on June 18, 2011 (78 FR 36643), is withdrawn by this notice.

Robert C. McFetridge,

Director, Office of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

[FR Doc. 2013–17748 Filed 7–23–13; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 78 Wednesday,

No. 142 July 24, 2013

Part II

Department of Housing and Urban Development

24 CFR Parts 91 and 92

HOME Investment Partnerships Program: Improving Performance and Accountability; Updating Property Standards

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 91 and 92

[Docket No. FR–5563–F–02]

RIN 2501–AC94

HOME Investment Partnerships Program: Improving Performance and Accountability; Updating Property Standards

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Final rule.

SUMMARY: HUD's HOME Investment Partnerships Program (HOME program or HOME) provides formula grants to states and units of local government to fund a wide range of activities directed to producing or maintaining affordable housing, including homebuyer and homeowner housing and rental housing. This final rule amends the HOME regulations to address many of the operational challenges facing participating jurisdictions, particularly challenges related to recent housing market conditions and the alignment of federal housing programs. The final rule also clarifies certain existing regulatory requirements and establishes new requirements designed to enhance accountability by States and units of local government in the use of HOME funds, strengthen performance standards and require more timely housing production. The final rule also updates property standards applicable to housing assisted by HOME funds.

DATES: *Effective Date:* August 23, 2013.

FOR FURTHER INFORMATION CONTACT: Virginia Sardone, Deputy Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7164, Washington, DC 20410; telephone number 202–708–2684 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

Purpose of the Regulatory Action. The HOME program was authorized in 1990, and is the largest federal block grant to State and local governments designed exclusively to produce affordable housing for low-income households. The program provides formula grants for four primary purposes: production of new single or multifamily housing units, rehabilitation of single or multifamily housing, direct homeownership assistance, or time-limited tenant-based rental assistance (for up to two years with possibility of renewal). All HOME funds must be used to benefit families and individuals who qualify as low-income at or below 80 percent of area median income. The HOME program provides state and local governments with the discretion to determine the type of housing product in which they will invest, the location of these investments, and the segment of their population that will be housed through these investments.

Although the HOME program is the largest federal block grant program for affordable housing, the HOME program regulations have not been updated in 16 years. Since the promulgation of the final rule in 1996, many HOME participating jurisdictions have adopted more complex program designs. They have encountered new challenges in administering their programs and in managing their growing portfolios of older HOME projects. These challenges include reduced availability of State or local funding sources, limited private lending, changes in housing property standards and energy codes, and reductions in State and local government workforces throughout the Nation. These challenges have been magnified by current housing and credit market conditions.

Over the years, HUD has invested significant time and resources in helping participating jurisdictions meet these challenges, as well as assisting them to correct financial and physical problems that threaten the viability of some HOME-assisted rental projects in their portfolios. HUD has determined that the most effective way to assist participating jurisdictions is to update the HOME program regulations to both provide participating jurisdictions with additional tools and flexibility to effectively address troubled projects, as well as increase accountability on the part of participating jurisdictions and oversight by HUD.

Summary of Major Provisions in the Final Rule. Through this final rule, which follows a proposed rule and takes into consideration the comments received on the proposed rule, HUD is establishing regulatory changes to address the operational challenges facing participating jurisdictions, improve understanding of HOME program requirements, update property standards to which housing funded by HOME funds must adhere, and strengthen participating jurisdictions' accountability for both compliance with program requirements and performance. Specifically, the final rule updates definitions and adds new terminology relevant to the housing market and real estate market, modifies the eligibility requirements of community housing development organizations that seek to participate in the HOME program to help ensure that they have the capacity to undertake their responsibilities under the HOME Program; establishes deadlines for project completion in an effort to ensure that housing units needed by low-income households are constructed and made available timely, strengthens conflict of interest provisions, and clarifies language in several existing HOME regulatory provisions to remove any possible ambiguity as to what is expected of participating jurisdictions, community housing development organizations and other entities that participate in the HOME program.

HUD is also taking the opportunity afforded by this final rule to make several technical, non-substantive changes. Specifically, HUD is revising several incorrect or outdated citations in § 92.353(c)(1) and (2) related to displacement, relocation and acquisition. The existing reference to 24 CFR 5.613 is replaced with 24 CFR 5.628. HUD is also updating the provisions of § 92.257 (Faith-Based Activities) to reflect the amendments made by Executive Order 13559 (Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations) issued by President Obama on November 17, 2010, and published in the **Federal Register** on November 22, 2010 (75 FR 71319) to Executive Order 13279 (Equal Protection of the Laws for Faith-Based and Community Organizations) issued by President Bush on December 12, 2002, and published in the **Federal Register** on December 16, 2002 (67 FR 77141).

Costs and Benefits. The regulatory changes being established by this rule that are designed to improve program performance and oversight are expected to lead to a more efficient allocation of resources within the program and the provision of more affordable housing. As discussed in more detail in the accompanying regulatory impact analysis for this rule, some elements of the rule have the potential to impose compliance costs on participants. However, these costs will either be absorbed by the HOME program or can be avoided through more efficient behavior on the part of participating jurisdictions and developers. For the most part, the changes in the rule do not establish new requirements; rather, they clarify or modify existing requirements, so they do not add costs to the participating jurisdictions or developers. Although the rule is expected to create some efficiencies within the HOME program, the rule is not expected to have a measurable impact beyond the grant program.

II. Background—The HOME Program

The HOME program was authorized by Title II of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12721 *et seq.*), known as NAHA, and has been in operation for 20 years. The HOME program provides grants to States and local jurisdictions (collectively, participating jurisdictions), which are used, often in partnership with local nonprofit groups, to fund a wide range of activities that construct, acquire, and/or rehabilitate affordable housing for rent or homeownership, or to provide direct rental assistance to low-income people. HOME program funds are awarded annually as formula grants to participating jurisdictions. HUD establishes a HOME Investment Trust Fund for each participating jurisdiction, providing a line of credit that the jurisdiction may draw upon as needed. The participating jurisdictions are allowed to use their HOME funds as grants, direct loans, loan guarantees, or other forms of credit enhancement, or as rental assistance or security deposits.

The HOME program is the largest federal block grant to States and local governments that is designed exclusively to create affordable housing for low-income households. Each year, the program allocates approximately $1.0 to $1.5 billion among the States and hundreds of localities nationwide. The program was designed to reinforce several important values and principles of community development. First, the HOME program's flexibility is intended to empower people and communities to design and implement strategies tailored to their own needs and priorities. Second, the HOME program's emphasis on consolidated planning is intended to expand and strengthen partnerships among all levels of government and the private sector in the development of affordable housing. Third, the HOME program's technical assistance activities and set-aside for qualified community-based nonprofit housing groups is intended to help build the capacity of these partners. Fourth, the HOME program's requirement that participating jurisdictions match 25 cents of every dollar in program funds is intended to help mobilize community resources in support of affordable housing.

The regulations for the HOME program are codified in 24 CFR part 92 and were last substantively revised by the final rule issued on September 16, 1996 (61 FR 48750). In the 16 years since the promulgation of the 1996 final rule, many HOME participating jurisdictions have adopted more complex program designs. They have encountered new challenges in administering their programs and in managing their growing portfolios of older HOME projects. These challenges include reduced availability of States or local funding sources, reduced private lending, changes in housing property standards and energy codes, and reductions in State and local government workforces throughout the Nation. These challenges have been magnified by current housing and credit market conditions.

Since the establishment of the HOME program, HUD has monitored participating jurisdictions' use of HOME funds and measured participating jurisdictions' performance. Through monitoring and audits, including those by HUD's Office of Inspector General (OIG), HUD has identified and corrected compliance problems and used this information to strengthen and clarify regulatory provisions to help avoid noncompliance and maximize effectiveness.

HUD has invested significant time and resources in helping participating jurisdictions correct financial and physical problems that threaten the viability of some HOME-assisted rental projects in their portfolios. HUD has determined that participating jurisdictions need additional tools and flexibility to effectively address troubled projects. Over the last several years, HUD has developed numerous publicly available reports that measure the performance and effectiveness of each participating jurisdiction.[1] HUD's review of these reports has identified performance and reporting problems among participating jurisdictions that cannot be addressed effectively under the current regulations.

Accordingly, through this rule, HUD makes regulatory changes to address many of the operational challenges facing participating jurisdictions, improve understanding of HOME program requirements, update property standards to which housing funded by HOME funds must adhere, and strengthen participating jurisdictions' accountability for both compliance with program requirements and performance.

[1] See *http://www.hud.gov/offices/cpd/affordablehousing/reports/.*

III. Overview of Key Changes Made to HOME Program Regulations at Final Rule Stage

The final rule largely adopts the provisions in the proposed rule, but HUD did make certain changes to the proposed regulatory provisions in response to public comments and further consideration of issues. Additionally, HUD further clarified language in various regulatory provisions for which commenters continued to indicate misunderstanding about the intent or meaning of the provision. Key changes made at the final rule stage include the following:

- Amending the definition of ''commitment'' to reinforce that participating jurisdictions must not commit HOME funds to a project in the Integrated Disbursement and Information System (IDIS) or in a written agreement until all necessary financing has been secured, a budget and production schedule established, and underwriting and subsidy layering completed; and clarifying, within that definition, the meaning of commit to a specific local project;
- Adding missing regulatory text to the definition of community housing development organization, language discussed in the preamble to the proposed rule, but which was inadvertently omitted in the regulatory text;
- Adopting language that permits a private nonprofit organization to qualify as a community housing development organization if the organization is a wholly-owned entity that is regarded as an entity separate from its owner for tax purposes, the owner has a tax exemption ruling from the Internal Revenue under section 501(c)(3) or (4) of the Internal Revenue Code of 1986 and the organization meets the definition of ''community housing development organization.''
- Removing the prohibition imposed on community housing development organizations from occupying the office spaced owned by a government entity or a for-profit parent organization.
- Permitting community housing development organizations to use consultants to demonstrate their capacity, but only during the first year of the organization's participation as a community housing development organization;
- Allowing community housing development organizations to become owners of rental housing that they do not develop;
- Revising the definition of ''homeownership'' to include manufactured housing which is on land

owned by a not-for-profit cooperative if the homeowner is a member of the cooperative, by a not-for-profit resident corporation, or by a similar type not-for-profit resident control organization;

- Revising the definition of ''homeownership'' to explicitly permit ground leases of 50 years or more for community land trusts;
- Adopting a 12-month timeframe for committing HOME funds for reconstruction of a unit that was destroyed;
- Providing that designation of a HOME project as a single room occupancy unit must be consistent with local zoning and building code classifications;
- Establishing the timeframe for income source documentation as 2 months;
- Making the cost of conducting unit inspections and determining the income of tenant-based rental assistance applicants or recipients an eligible project-related soft cost;
- Permitting participating jurisdictions to count as match the value of the contribution, if the contribution provides a direct financial benefit to the homebuyer, or the contribution, if the contribution to the development of the homebuyer unit reduces the sales price of the unit or enables the unit to be sold for less than the cost of development;
- Eliminating the requirement for separate written standards for methods and materials for new construction projects;
- Eliminating the requirement for a minimum 15-year useful life of major systems, and providing, in lieu of such requirement, that the participating jurisdiction must estimate the remaining useful life of major systems based on age and current condition of the systems and determine the necessary annual replacement reserve contributions to facilitate system replacement at the appropriate time;
- Providing that the requirement for a current inspection of a unit is no earlier than 90 days before the commitment of HOME assistance;
- Extending the timeframe for selling homebuyer units to 9 months from the completion of construction; and
- Revising the description of the cumulative methodology that HUD uses to determine compliance with the commitment, CHDO reservation, and expenditure deadlines to better present the method of calculation in use.

IV. December 2011 Proposed Rule

On December 16, 2011 (76 FR 78344), HUD published a proposed rule that would amend the HOME Investment Partnerships Program (HOME) program regulations to address many of the operational challenges confronting participating jurisdictions in relation to recent housing market conditions and the alignment of federal housing programs. The proposed rule also sought to clarify certain existing regulatory requirements, establish new requirements to enhance accountability, and update property standards. In addition to proposed changes to the HOME program regulations, the December 16, 2011, rule also proposed changes to HUD's Consolidated Plan regulations that pertained to the HOME program.

In the proposed rule, HUD also sought public comment on the following issues or provisions proposed in the rule: (1) Timeframes that would help ensure that initial occupancy of a HOME-assisted rental unit occurs timely following project completion and that HOME funds invested in rental units that have not been initially occupied within 18 months are repaid; and (2) use of the Bureau of the Census' median sales price for single family houses sold outside of Metropolitan Statistical Areas (MSAs) as the sale price limitation for newly constructed HOME units; (3) criteria used in and characteristics of an effective risk-based system for on-site monitoring by States; and (4) participating jurisdictions performing regular financial reviews, specifically, regarding the unit-threshold for trigging annual financial reviews and whether it would be appropriate to establish a regulatory requirement for less frequent financial reviews of smaller projects.

The public comment period on the proposed rule closed on February 14, 2012. HUD received 322 public comments in response to the December 16, 2011, proposed rule. Comments were submitted by various State and local participating jurisdictions, public housing authorities, individuals, trade associations, community housing development organizations (CHDOs), housing finance agencies, county governments, community land trust organizations, council of governments, housing and community development organizations, and other stakeholders.

The following section sets out the key issues raised by the public commenters on the December 16, 2011, HOME Program proposed rule, and HUD's responses to these issues.

V. Discussion of Public Comments and HUD Responses

A. General Comments on the Proposed Rule

Increased Administrative Burden, Costs, and Reduced Flexibility

HUD received many comments on the general direction of the proposed rule. Overall, commenters acknowledged that the HOME regulations needed updating to reflect current market conditions and challenges in affordable housing production. However, several commenters stated that, taken as a whole, HUD's proposed changes were an overreaction to largely unfounded criticisms. These commenters stated that the proposed rule ran counter to the flexibility that has long been a hallmark of the HOME program as the nation's largest affordable housing block grant program. This flexibility, they submit, has led to States and local governments producing more than one million affordable housing units that meet their locally-determined needs and priorities over the program's 20-year history. The commenters stated that the proposed rule would add a very significant administrative burden and additional costs on States and local governments at a time when governments are facing layoffs, furloughs, and a significant diminution of other available affordable housing and administrative resources, as well as very significant cuts to their annual HOME allocations. In addition, some participating jurisdictions commented that adoption of the proposed rule provisions would raise both development costs and administrative costs, in addition to increasing the administrative burden associated with developing and managing each HOME-assisted project, with the result being a reduction in the number of affordable housing units that participating jurisdictions could produce. Commenters from rural areas stated that they were particularly concerned with the feasibility of complying with the proposed HOME requirements. Other commenters expressed concern about the effect that proposed CHDO-related changes would have on these organizations.

HUD Response: Several provisions in the proposed rule that are being adopted by this final rule are best practices already in use by participating jurisdictions, and this final rule codifies those practices for purposes of uniformity and increasing accountability and performance under the HOME Program. HUD is aware that adoption of other provisions of the proposed rule at this final rule stage will result in some increase in the administrative burden and, in some cases, the cost of developing and monitoring HOME-assisted housing. However, HUD has determined that these changes are necessary to enhance accountability and oversight and help ensure that HOME program funds deliver their intended benefit as expeditiously and effectively as possible. As provided in the proposed rule and this final rule, some of the additional costs can be paid as project-related soft costs with HOME funds (e.g., underwriting, market analysis) or funded through the imposition of project monitoring fees.

Effective Date of Final Rule Changes

Comments: Commenters expressed concern regarding the effective date that HUD would establish for many of the proposed changes. Commenters asked if the changes—particularly a new project-specific completion deadline, underwriting requirements, and changes applicable to CHDOs—would apply retroactively to projects that already have received commitments of HOME funds. Commenters stated that it would be infeasible for projects that already have a legally binding written agreement or are already underway to comply with many of the requirements of the proposed rule.

HUD Response: Most provisions of this rule are applicable only to projects to which HOME funds are committed on or after the effective date of this final rule. The effective date for certain provisions will be delayed to permit participating jurisdictions adequate time to comply. HUD has added a new § 92.3 that establishes the effective dates for various provisions. Unless an alternate effective date is established in this section for a specific provision, the provisions of this final rule apply only to projects to which funds are committed on or after the effective date of this final rule. The property standard provisions established at § 92.251 will apply to projects to which funds are committed 18 months after the publication date of this final rule. The new provision that participating jurisdictions develop written homebuyer program policies related to underwriting, responsible lending, and refinancing becomes effective 6 month after the publication date of this final rule. The new provision that participating jurisdictions develop and follow policies and procedures established at § 92.504(a) will become effective 12 months after the publication date of this final rule in the **Federal Register**. The change in the definition of *commitment* at § 92.2 eliminating non-specific reservations to CHDOs as a commitment becomes effective 90 days after the publication date of the final rule and will be implemented by HUD for CHDO deadlines that occur on or after January 1, 2015. The separate 5-year deadline for expenditure of CHDO set-aside funds established at § 92.500(d)(1)(C) will become effective on January 1, 2015, and will be implemented by HUD for all deadlines that occur on or after that date. The requirement for participating jurisdictions to conduct financial oversight of HOME-assisted rental projects, will be effective 12 months after the publication date of the final rule.

B. Changes to HUD's Consolidated Plan Regulations

Approval Process

HUD proposed revising §§ 91.220(l)(i) and (ii) and 91.320(k)(i) and (ii) of the Consolidated Plan regulations, codified at 24 CFR part 91. Sections 92.205(b) and 92.254(a)(5) of the HOME program regulations proposed to clarify that participating jurisdictions must receive approval in writing from HUD, separate from the consolidated plan approval letter, for forms of investment of HOME funds other than those described in § 92.205(b) and resale and recapture guidelines.

Comments: A commenter supported this clarification. Another commenter stated that the requirement to obtain HUD approval of resale and recapture guidelines would create an administrative burden.

HUD Response: The proposed rule language attempted to clarify that the approval requirement for other forms of investment of HOME funds and resale and recapture guidelines already exist in 24 CFR 91.225(d)XX. HUD has always required the approval of these program components and the clarification in this section does not constitute a policy change. HUD is therefore adopting the proposed rule language without change.

Maximum Purchase Price for Single Family Housing

HUD proposed a revision to §§ 91.220 (l)(2)(iv) and 91.320(k)(2)(iv) to specifically require a participating jurisdiction that calculates its own 95 percent of median purchase price for HOME-assisted homebuyer or owner-occupied rehabilitation projects to submit its calculated limit and supporting documentation as part of its Consolidated Plan Annual Action Plan. The regulations currently codified do not specify the timing of the submission.

Comments: With respect to the timing of submission of the calculated limit and supporting documentation, a few commenters commenting on HUD's proposal supported the change.

HUD Response: HUD is adopting the proposed rule language without change.

Proposed Funding and Project Selection Procedures

HUD proposed amending §§ 91.220 (l)(2)(v) and 91.320(k)(2)(v) of the Consolidated Plan regulations to require participating jurisdictions to describe eligible applicants for HOME funds and describe their process for soliciting and funding applications or proposals as part of its Consolidated Plan annual action plan.

Comments: No opposition was expressed on this proposal but a few commenters sought clarification regarding the meaning of ''eligible applicant'' for the purposes of this provision.

HUD Response: The proposed provision would require participating jurisdictions to describe the types of individual or entities that are eligible to apply for and receive HOME funding (e.g., nonprofit or for-profit developers). HUD is largely adopting the proposed rule change, but has made minor changes to the wording of § 91.220(l)(2)(v) and § 91.320(k)(2) (v) to provide greater clarity.

Targeting of HOME Assistance to Subpopulations

HUD proposed adding a provision to § 91.220(l)(2)(vi) and § 91.320(k)(2)(v) of the Consolidated Plan regulations expressly permitting participating jurisdictions to limit HOME projects to specific populations, including to persons in a specific occupation (e.g., artists, police officers, or teachers) and requiring that participating jurisdictions include these uses in their Consolidated Plan Annual Action Plans.

Comments: While a few commenters expressed support for this provision, the majority of commenters commenting on this proposal opposed limiting program participation to beneficiaries in specific occupations (e.g., artists, police officers, or teachers), stating that program targeting should be based on populations with the greatest needs, as identified in the participating jurisdiction's consolidated plan.

HUD Response: Participating jurisdictions have broad authority to target their HOME funds to specific populations or special needs groups, as long as such targeting does not have the intent or effect of violating civil rights laws. Many participating jurisdictions have already undertaken HOME projects targeted to specific occupational groups. The purpose of this proposed provision was to require that participating jurisdictions make public their intention to target certain categories of persons for housing assistance through the Consolidated Plan citizen participation process. HUD is adopting the proposed rule language without change.

C. Changes to the HOME Program Regulations

1. Definitions (§ 92.2)

HUD received no comments on the proposed addition of the following definitions to the HOME regulations: *1937 Act, ALJ (Administrative Law Judge), Fair Housing Act, Indian Housing Authority (IHA), Public Housing, Public Housing Agency (PHA), Secretary, CDBG program, Observed Deficiency (OD), and Consolidated Plan.* Several comments were received regarding Uniform Physical Property Condition Standards (UPCS). However, these comments did not address the definition, but rather the applicability of those standards to HOME projects. Consequently, those comments are addressed under Property Standards at § 92.251.

Commitment. HUD proposed several changes to the definition of ''commitment'' at § 92.2, including: (1) Specifically including an agreement with a state recipient, a subrecipient, or a contractor to use a specific amount of HOME funds to provide downpayment assistance; (2) eliminating the reservation of funds to community housing development organizations (CHDOs) so that agreements that are not project-specific would no longer be considered a commitment; (3) adding a requirement that the signature of each party to the agreement be dated; (4) cross-referencing the written agreement requirements at § 92.504(c); and (5) excluding agreements between a participating jurisdiction and a subrecipient that the participating jurisdiction controls, and agreements between the representative unit (i.e., lead member) of a consortium and local government consortium member.

Comments: HUD received numerous comments in response to these proposed changes. Although a few commenters supported the proposed changes, the majority of the commenters commenting on this provision expressed concern regarding HUD's proposal to remove references to CHDO reservations from the definition of commitment.

Commenters stated that requiring participating jurisdictions and CHDOs to enter into a project-specific commitment within 24 months of the obligation of the HOME grant would be burdensome.

Commenters requested that HUD include as a commitment conditional reservations of funds that would allow CHDOs to secure additional funding for HOME-assisted projects, including Low Income Housing Tax Credits (LIHTC).

A commenter requested clarification on whether the revised commitment definition excluded agreements between a participating jurisdiction and a subrecipient that the participating jurisdiction controls. The commenter appeared to not understand that HUD was proposing to revise the definition of commitment to exclude exactly such cases. When a participating jurisdiction controls a subrecipient, only a legally binding written agreement between the two parties for a specific HOME project would meet the proposed definition.

Other commenters expressed concern about the timing and implementation of the new commitment requirements and how adoption of the new definition would affect upcoming 24-month HOME commitment deadlines.

HUD Response: HUD's intent in revising the definition of commitment was to increase participating jurisdictions' accountability for the use of HOME funds. Requiring participating jurisdictions to execute a written agreement for a specific HOME project with a CHDO, certain subrecipients, or consortia members within 24 months of HUD's obligation of the HOME allocation is designed to help ensure that HOME funds are used as expeditiously as possible to develop affordable housing. Consequently, HUD is adopting the proposed rule language without change.

At this final rule stage, HUD is further amending the commitment definition to reinforce that participating jurisdictions must not commit HOME funds to a project until all necessary financing has been secured, a budget and schedule established, and underwriting and subsidy layering completed. Based upon many of the comments received in response to the 4-year deadline for project completion proposed in § 92.205(e), participating jurisdictions appeared to not fully understand the point at which a commitment of HOME funds may take place.

Community Housing Development Organization. HUD proposed several changes to or clarification of this definition and received many comments on the proposed changes.

New Provision Relating to 501(c)(4) Organizations

The preamble of the proposed rule stated that HUD proposed revising the definition of ''community housing development organization'' (CHDO) in § 92.2 to add a reference to the Internal Revenue Service (IRS) regulations that implement section 501(c)(4) of the Internal Revenue Code to permit wholly-owned subsidiaries of a private non-profit organization that meet the requirements for CHDO designation to also qualify as a CHDO. The regulatory language was inadvertently omitted from the definition of CHDO at § 92.2 and this final rule corrects that error by including the regulatory text.

Comments: A commenter opposed permitting organizations with a 501(c)(4) designation from the IRS to be qualified as CHDOs. The commenter stated that those organizations are not subject to the same public disclosure requirements as 501(c)(3) organizations and may participate in advocacy, including political advocacy. Another commenter recommended that PHAs that have 501(c)(3) designations be permitted to be qualified as CHDOs. Other commenters recommended that HUD permit organizations that are subordinates of a central organization nonprofit under section 905 of the Internal Revenue Code to qualify as CHDOs.

HUD Response: HUD does not agree that PHAs that have 501(c)(3) designations should qualify as CHDOs because PHAs are publicly-established organizations and are not community-based organizations that are accountable to the low-income community. For many years, HUD's administrative guidance on CHDO qualifications permitted subordinates of a central organization under section 905 of the Internal Revenue Code to qualify as CHDOs. HUD agrees with commenters that codifying the eligibility of these organizations in the regulations is appropriate and this final rule explicitly permits such organizations to be designated as CHDOs.

At this final rule stage, HUD is also adopting language in the proposed rule that permits a private nonprofit organization to qualify as a CHDO if it is a wholly-owned entity that is regarded as an entity separate from its owner for tax purposes (e.g., a single member limited liability company that is wholly-owned by an organization that qualifies as tax-exempt), the owner organization has a tax exemption ruling from the IRS under section 501(c)(3) or (4) of the Internal Revenue Code of 1986 and meets the definition of ''community housing development organization.''

CHDO Relationship With Parent Organizations

HUD proposed revising the CHDO definition to clarify the relationship between the CHDO and its parent organization by adding a new paragraph (3)(iv) clarifying that, if a for-profit entity creates or sponsors a nonprofit entity that seeks designation as a CHDO, the officers and employees of the for-profit entity would be prohibited from serving as officers or employees of the CHDO, and the nonprofit entity would be prohibited from using the office space of the for-profit entity.

Comments: A few commenters supported this provision, citing the intent of the proposal to increase the separation between a CHDO and a for-profit parent organization. A commenter opposed the prohibition on CHDOs occupying the space of for-profit parent organizations because of the limited financial resources available to CHDOs, particularly rural CHDOs.

HUD Response: HUD understands that prohibiting CHDOs from occupying the office space of its for-profit parent organization may be financially difficult for some organizations. The prohibition was proposed to help avoid situations where for-profit entities could exert undue influences on their subsidiary organizations. However, HUD believes that other changes in this final rule provide sufficient oversight to avoid these undue influences. The prohibition on CHDOs occupying office space of for-profit entities has been removed from the rule.

Governmental Control of CHDOs

HUD proposed revising paragraph (5) of the definition to clarify that a governmental entity may create a CHDO, but is not permitted to control the CHDO by providing its employees to the CHDO as staff or officers. The revision to the rule would also prohibit CHDOs from occupying the office space of a governmental entity.

Comments: Several commenters objected to this provision because they stated it would preclude PHAs from forming CHDOs that would be controlled by a PHA-appointed board and staffed by PHA employees. Other commenters objected to the provision prohibiting a CHDO from occupying the office space of a governmental entity, and other commenters expressed concern about the effect the prohibition would have on CHDOs in rural areas where office space is limited.

HUD Response: HUD understands that many PHAs have created subsidiary organizations to serve as a development arm of the PHA. Both PHAs and their development subsidiaries serve an important function in the HOME program. However, if these organizations are to qualify as CHDOs, they must not be controlled and staffed by the PHA. If a PHA does not seek to alter the existing arrangements that it has with its subsidiary organizations, then this organization can continue to participate in the HOME program, but as a non-profit developer rather than a CHDO. HUD agrees that prohibiting a CHDO from occupying the office space owned by a governmental entity may constitute an undue obstacle to CHDO operations and is therefore removing that portion of the provision. HUD is adopting, without change, the proposed rule language that prohibits a governmental entity that creates a CHDO from providing its employees as CHDO staff.

Demonstrated CHDO Capacity and Staffing

HUD proposed revising paragraph (9) of the existing definition of CHDO at § 92.2 to strengthen the requirement that an organization must have paid employee staff with housing development experience in order to be designated as a CHDO. The proposed rule specified that the demonstrated capacity requirement could not be met through the use of volunteers or staff donated by another organization. The rule also proposed to eliminate the provision that permitted a CHDO to meet the capacity requirement based upon the use of a consultant to undertake activities and train CHDO staff.

Comments: HUD received many comments on these proposed changes. Nearly all commenters opposed these provisions, stating that the proposed changes would eliminate some organizations from gaining or retaining CHDO status or make it more difficult for participating jurisdictions to meet their CHDO set-aside requirements. Some commenters stated that CHDOs often cannot afford to pay staff and must rely on donated staff from parent organizations, volunteers, board members, or consultants. Other commenters stated that the prohibition on relying on volunteers to demonstrate capacity would affect faith-based and other small organizations. A commenter asked that HUD permit independent contractors, in addition to paid staff, to work full time. Several commenters stated that the requirement that CHDOs have demonstrated capacity is at odds with NAHA, which has, as one of its purposes, building nonprofit development capacity. Other commenters urged HUD to continue to permit the use of consultants to meet the demonstrated capacity test, stating that this arrangement is particularly important in rural areas. Several commenters further urged HUD to phase in these requirements over a period of 5 or 10 years, or to apply them only to new CHDOs.

HUD Response: HUD acknowledges the concerns raised by commenters and understands that the adoption of these provisions will result in changes to the manner in which CHDOs have operated to date. HUD recognizes that, with these changes in place, some current CHDOs will be unable to meet the new requirements for CHDO designation, and therefore will not receive additional CHDO set-aside funds. Additionally, HUD understands that because of these changes, in some participating jurisdictions, CHDO set-aside funds may be deobligated due to a lack of qualified CHDOs.

Notwithstanding the recognized difficulty that compliance with the new provisions applicable to CHDOs may present, HUD determined that these changes are necessary to ensure that the hundreds of millions of CHDO set-aside funds that are awarded each year are committed to organizations that have adequate capacity to carry out and complete the projects for which they are being funded, so that the funds benefit the low-income individuals and families the HOME program is designed to serve. Therefore, the final rule retains the requirement that CHDOs that receive CHDO set-aside funds to develop HOME-assisted housing must demonstrate development capacity through paid staff with development experience.

It is important to note that the rule does not prohibit the CHDO from using volunteers, board members, and staff of parent organizations in its operations; however, these individuals cannot be the basis for the determination of development capacity. Further, in requiring paid employees, HUD is not prohibiting a CHDO from employing an individual who is an independent contractor and using that contractor's experience as the basis for the demonstrated capacity determination. Paid staff is not required to be full time, but their hours must be appropriate for the role they play in the organization.

Additionally, HUD agrees that the use of consultants by new CHDOs is appropriate. Accordingly, HUD has revised at this final rule stage, the proposed rule language to permit the use of consultants to demonstrate capacity, but only during the first year of an organization's operation as a CHDO. Because the provisions of the proposed rule were made applicable to FY 2012 HOME funds in HUD's FY 2012 appropriation law, HUD sees no benefit to participating jurisdictions or CHDOs in delaying the implementation of these provisions.

In response to the concerns raised about the effect of these provisions on organizations that are currently designated as CHDOs, HUD has made a substantial change in the definition of owner in revised § 92.300(a)(2) that establishes a new role for CHDOs to become owners of rental housing that they do not develop. HUD expects that this change will allow CHDOs without demonstrated development capacity to continue to access HOME funds to address the affordable housing needs in their communities.

Homeownership. HUD proposed rearranging existing provisions in the definition of ''homeownership'' in § 92.2 to improve clarity, as well as clarifying that contracts for deed (also known as installment contracts or land sales contracts) and mutual or cooperative housing that receives LIHTC do not constitute homeownership.

Comments: A few commenters stated that contracts for deed or installment contracts should constitute homeownership for purposes of the HOME program. Other commenters stated that the revised definition inappropriately excluded individuals who own manufactured homes that are located in manufactured housing communities. Other commenters requested clarification on the eligibility of 50-year community land trust ground leases as an eligible form of homeownership and requested that HUD explicitly address ground leases and the community land trust approach in the definition of homeownership.

HUD Response: While HUD acknowledges that contracts for deed, installment contracts, and land sales contracts are common in certain areas of the country, these contracts fail to provide equitable title to the contracting party, who remains vulnerable to forfeiting the property until the final payment is made. Although some states provide some protections to the contracting party, the rights are not equal to those individuals who own their homes fee simple or in an equivalent form of homeownership. Assisting individuals and families who have entered into contracts for deeds to acquire their home fee simple is an appropriate use of HOME funds, but assisting low-income families through contract for deed situations is not. For these reasons HUD is adopting the restriction in the proposed rule in this final rule.

HUD does not agree that the homeownership definition in the proposed rule excludes owner-occupied manufactured homes located in manufactured home communities. However, HUD has revised the homeownership definition to reflect the existing language in § 92.205(a)(4) to clarify that, in such situations, the ground lease must be at least equal to the applicable period of affordability.

Several commenters interpreted the proposed rule as permitting community land trusts with 50-year ground leases as an eligible form of homeownership. The commenters, however, misread the language, which is applicable only to Indian trusts. The proposed rule retained the 99-year leasehold requirement for projects, other than community land trusts, involving ground leases.

Other commenters suggested that HUD add a section to the homeownership definition explicitly addressing community land trusts. While HUD does not agree that a separate paragraph is needed to address community land trusts in this definition, HUD does agree that it would be appropriate to recognize community land trusts with 50-year ground leases as homeownership. Consequently, at this final rule stage, HUD is amending the definition to explicitly permit ground leases of 50 or more years for community land trusts.

Housing. HUD proposed to amend the definition of ''housing'' in § 92.2 to exclude all student housing, not just student dormitories. The use of HOME funds for student housing, in any configuration, is inconsistent with the statutory purposes of the program. In addition, the proposed rule amended the definition to clarify that dormitories, including those for farmworkers, do not constitute housing.

Comments: HUD received many comments on the proposed revisions to the definition of housing. Commenters expressed concern about the language limiting housing for students and asked whether the proposed definition excludes providing any type of housing to any student, regardless of need or situation. Other commenters expressed concern that the student housing exclusion will negatively affect persons with disabilities and the homeless who may be participating in classes as part of a broader supportive or transitional housing program. Other comments sought clarification and guidance on farmworker housing, including whether farmworker dormitories constitute housing, or are differentiated from student housing.

HUD Response: The use of HOME funds is statutorily limited to permanent and transitional affordable housing for low-income households. Consequently, housing that does not provide a permanent or transitional residence for income-eligible households is ineligible for HOME assistance. Student housing and dormitories, including farmworker dormitories, provide short-term or transitory housing, not permanent or transitional housing, as required by statute. In reviewing the comments, HUD found that several commenters appeared to confuse what constitutes eligible housing with who is considered an eligible beneficiary of HOME-assisted housing. The proposed changes to the definition of housing addressed the housing structure and what constitutes eligible affordable housing.

In revising the definition of housing, HUD's intent was to clarify the difference between ineligible student or farmworker housing and eligible permanent or transitional housing. Given the many commenters commenting on this provision, and who appeared to not understand this distinction, HUD has further clarified the definition of housing. Revisions were also made to the language in the definitions of low-income and very low-income families that provide additional clarification on when a student household may be an eligible beneficiary.

Low-Income Family and Very Low-Income Family. HUD proposed revising the definition of ''low-income families'' and ''very low-income families'' in § 92.2 to conform with the definitions used in the Section 8 Housing Choice Voucher (HCV) program, which excludes certain students from qualifying as a low-income or very low–income family.

Comments: Several commenters expressed concern about eliminating students who are dependents of their families from eligibility for HOME assistance. Some commenters recommended that HUD align the HOME requirements with the HCV provisions. Other commenters suggested that HUD align the HOME requirements with LIHTC policy. Yet, other commenters stated that HUD should remove the term ''married'' from the definition, as it might prohibit participation of students in other types of domestic partnerships. Several commenters questioned whether this policy would prohibit the use of HOME funds to assist homeless youth or youth aging out of foster care.

HUD Response: The addition of this language to these definitions would have no effect on the eligibility of homeless youth, who would be considered either individually low-income or a member of a low-income family, or youth aging out of foster care, who would qualify as individually low-income. This provision is intended solely to help ensure that HOME funds benefit individuals and families who are low-income or very low-income, and that scarce HOME resources are not targeted to students who are dependents of families who are not low-income. HUD proposed adopting the Section 8 Housing Choice Voucher provisions, which were the result of recent legislative changes, because the voucher provisions reflect the intent of Congress that federal housing resources be targeted to low-income and very low-income families. Instead of including the entire HCV definition in § 92.2, HUD is replacing the proposed rule language with a cross-reference to the HCV requirement at 24 CFR 5.612.

Program income. HUD proposed amending the definition of ''program income'' in § 92.2 to clarify that it does not include gross income from the use, rental, or sale of real property received by the project owner, developer, or sponsor, unless the funds are paid by the project owner, developer, or sponsor to the participating jurisdiction, subrecipient, or state recipient.

Comments: A few commenters stated that rental income should not be considered program income unless otherwise owed and paid to the participating jurisdiction or subrecipient.

HUD Response: The purpose of this change is to clarify that rent received by project owners is not program income unless it is required to be paid to the participating jurisdiction or subrecipient. The commenters appear to have misunderstood that HUD was intending only to clarify this requirement. HUD agrees that rent should not be considered program income unless it is received by a participating jurisdiction or subrecipient. HUD is adopting the proposed rule language without change.

Project Completion. HUD proposed amending the definition of ''project completion'' in § 92.2 to clarify the conditions that must be met for projects to be considered completed, including the point at which a participating jurisdiction can complete a project in IDIS, the HOME data system.

Comments: HUD received several comments expressing confusion regarding the difference between project completion in IDIS and the point at which the proposed 6-month period that homebuyer units must be sold or converted to rental units. A commenter stated that commencing the period of affordability for a homebuyer project on the date that a project is completed in IDIS rather than on the date that the sale takes place penalizes homebuyers by extending the period of affordability on their unit.

HUD Response: HUD acknowledges that the proposed rule may have caused some confusion by using the term ''project completion'' in § 92.254(a)(3) when describing the point at which the proposed 6-month timeframe for sale or conversion of homebuyer units is triggered. Section 92.254(a)(3) should have stated that the completion of construction triggers the beginning of this 6-month period. HUD has corrected the error in that section of this rule. While HUD understands that there may be some lag between closing on a homebuyer unit and entry of project completion data in IDIS, the participating jurisdiction has the required information to complete the homebuyer project in IDIS on the day of the closing and must adopt procedures that minimize delays in entering completion data. HUD is adopting the proposed rule language without change.

Reconstruction. HUD proposed amending the definition of ''reconstruction'' in § 92.2 to facilitate participating jurisdictions' rebuilding efforts after disasters by permitting reconstruction of units that were not standing on the site at the time of fund commitment.

Comments: Commenters identified a discrepancy between the proposed rule text, which permitted HOME funds to be committed for reconstruction of a unit destroyed by disaster within 12 months, and the rule text that designated the period as 6 months. Other commenters supported the 12-month timeframe to commit HOME funds for reconstruction after a disaster. Several commenters stated that 12 months would not be a sufficient period to address destroyed housing in the event of a major disaster and suggested that the timeframe be extended to 36 months. A commenter recommended that HUD establish a process for granting exceptions in the event of major disasters. Another commenter suggested that HUD establish a continuum of timeframes for committing funds for reconstruction, covering situations ranging from a single house fire to mass destruction of housing due to a natural disaster. Several commenters urged HUD to include replacement of a manufactured housing unit with stick-built housing in the definition of reconstruction.

HUD Response: Because the situations covered by this proposed change in the definition will range from destruction of a single unit to destruction of hundreds of housing units, HUD does not support extending the regulatory timeframe beyond 12 months. As explained in the preamble to the proposed rule, waivers of the timeframe can be granted in the event of widespread destruction of housing due to natural disaster. Further, establishing appropriate timeframes for disasters of differing magnitudes would be difficult and would cause undue complexity for participating jurisdictions. HUD does not agree that replacement of a manufactured housing unit with stick-built housing should be defined as reconstruction. While it is possible to use HOME funds to replace manufactured housing with stick-built housing, these projects are considered new construction, not reconstruction. HUD is adopting the proposed 12-month timeframe for committing HOME funds for reconstruction of a unit.

Single room occupancy. HUD proposed revising the definition of ''single room occupancy (SRO)'' in § 92.2 to require that a project could be designated as an SRO for HOME purposes only if its characteristics are consistent with the participating jurisdiction's applicable zoning and building code classifications for SRO housing.

Comments: Several commenters expressed concern that some jurisdictions do not include a SRO designation in their zoning and building code classifications. Consequently, participating jurisdictions without such classifications might be prohibited from using HOME funds for SROs or might be required to designate such projects as group homes, resulting in lower HOME subsidy limits and rents.

HUD Response: HUD agrees with the concerns raised by commenters and has revised the SRO definition to require that the designation of the HOME project as an SRO cannot be inconsistent with local zoning and building code classifications, resolving potential conflicts in jurisdictions that do not include SROs in their zoning and building code classifications.

Subrecipient. HUD proposed making minor revisions to the definition of ''subrecipient'' in § 92.2, for the purpose of clarifying that subrecipients receive funds to carry out programs (e.g., downpayment assistance programs, owner-occupied rehabilitation programs, etc.), not to undertake specific housing projects.

Comments: A commenter supported the clarification provided by the revised definition. Some commenters recommended that HUD include specific language in the regulations stating that selection of entities acting as owners, developers, or sponsors of housing is not subject to federal procurement rules, nor are owners, developers or sponsors themselves required to comply with federal procurement rules.

HUD Response: HUD did not find it necessary to specifically state in the HOME regulations that the selection of owners, developers and sponsors of housing is not subject to the procurement rules at 24 CFR part 84 and part 85, although a participating jurisdiction may choose to follow these requirements. The new provisions in 24 CFR part 91 requiring participating jurisdictions to include a description of eligible applicants and the method of soliciting applications and awarding HOME funding should clarify the selection methods of each participating jurisdiction.

2. Program Requirements

a. Jointly Funded Projects of Contiguous Jurisdictions (§ 92.201)

Section 218(a) of NAHA prohibits a participating jurisdiction from investing HOME funds in projects outside its boundaries, except for projects located in a contiguous jurisdiction that are joint projects that serve the residents of both jurisdictions. HUD found that there were participating jurisdictions unfamiliar with or not fully familiar with this provision. HUD proposed to revise § 92.201 to clarify that, to qualify as a joint project, a project must be ''jointly funded'' by the two contiguous jurisdictions and both jurisdictions must make a substantial financial contribution (e.g., waiver of impact fees, property taxes or other taxes or fees customarily imposed on projects within the jurisdiction) to the project.

Comments: Some commenters expressed their support for this clarification. A commenter suggested that HUD require one of the jurisdictions to take the lead role and permit only one jurisdiction to count the completed project toward their production goal.

HUD Response: HUD believes it is essential that each participating jurisdiction that invests HOME funds in a joint project be permitted to count a portion of the units toward its production totals. HUD is adopting the proposed rule language without change but will provide guidance regarding appropriate reporting in IDIS for these jointly funded projects.

b. Site and Neighborhood Standards (§ 92.202)

The proposed rule included a conforming change that would update the citation in § 92.202 to the site and neighborhoods regulations, which were moved to 24 CFR 983.57(e)(2) and (3). The site and neighborhood standards have applied to new construction rental projects funded with HOME since the inception of the program.

Comments: Several commenters appeared to misunderstand that this was a conforming change only, and opposed the imposition of new site and neighborhood requirements. These commenters recommended that participating jurisdictions be permitted to adopt their own standards. Commenters also suggested that HUD issue guidance on site and neighborhood standards for the HOME Program.

HUD Response: HUD included guidance on site and neighborhood standards in its guide entitled *Fair Housing for HOME Participants,* which is posted on HUD's Web site.[2] HUD is adopting the proposed rule language without change, with the exception of correcting the regulatory citation.

c. Income Determinations (§ 92.203)

HUD proposed several changes to § 92.203 related to calculation of annual income of a family or household for the purpose of determining the family's or household's eligibility for HOME assistance.

Required Source Documentation for Income Determinations

HUD proposed revising § 92.203(a)(1)(i) and (a)(2) to require participating jurisdictions to examine at least 3 months of source documentation (e.g., wage statements, interest statements, unemployment compensation) when performing income determinations for potential HOME beneficiaries.

Comments: While a few commenters expressed their support for this change, the majority of commenters commenting on this provision expressed their opposition to the requirement that participating jurisdictions examine at least 3 months of source documentation when determining income. The commenters offered different timeframes for required source documentation, with one commenter stating that 2 months was a more reasonable timeframe. Some commenters expressed concern that the new requirement would be inconsistent with other housing programs. Other commenters expressed concern that the requirement for 3 months of documentation might be an obstacle to low-income households receiving HOME assistance, because they might not have saved sufficient wage statements or bank statements. Several commenters specifically suggested that HUD align the required source documentation for the HOME program with the requirements outlined in HUD Handbook 4350.3 [3], which requires examination of 6 pay statements. Other commenters suggested that HUD accept Social Security disability insurance statements and certified copies of Form 1040 issued by the IRS as sources of documentation.

HUD Response: HUD's intent in proposing this requirement was to establish a standard period during which all participating jurisdictions must obtain income documentation. Because employers may pay employees weekly, biweekly or monthly, establishing a documentation standard based upon a number of pay stubs does not accomplish HUD's goal of a uniform standard. However, HUD agrees that it is appropriate to balance the need for accurate income determinations and eliminate inconsistent income documentation standards used by HOME participating jurisdictions, with the increased burden that will be placed on potential HOME beneficiaries if they are required to produce income documentation for an extended period of time. Consequently, HUD determined that it is appropriate to reduce the required timeframe for source documentation to 2 months.

This change aligns with the requirements of many private mortgage lenders and should be less burdensome to potential applicants, particularly applicants for rental housing who may not have retained documentation for an extended period. HUD is adopting a provision that requires examination of 2 months of income documentation when determining a family's eligibility for HOME assistance. HUD is not adopting the suggestion that it accept a certified IRS 1040 as income documentation. Certified IRS 1040 forms are very frequently obtained by participating jurisdictions for the purpose of determining income eligibility. However, unlike source documentation, such as wage statements, stubs and bank

[2] See *http://www.hud.gov/offices/cpd/affordablehousing/library/modelguides/2005/200510.cfm.*

[3] See *http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35639.pdf.*

statements, these forms do not contain the level of detail necessary to enable income to be accurately projected over the next 12 months.

Elimination of Census Long Form

HUD proposed revising § 92.203(b)(2) to eliminate the option currently available to participating jurisdictions to use the definition of ''annual income'' that is based on income reported on the Census long form because it was rarely used by participating jurisdictions.

Comments: Although few commenters commented on this provision, those who did expressed their support for eliminating this definition of income, stating that the elimination of the definition would eliminate confusion.

HUD Response: HUD did not receive any comments in opposition to elimination of this income definition, confirming HUD's belief that the definition is not being employed by participating jurisdictions. This rule eliminates the Census long form definition from the HOME regulations. Participating jurisdictions continue to have the option of using either the income definition in HUD's regulations at 24 CFR part 5 (often referred to as the Section 8 definition) or the definition of adjusted gross income of the IRS, both of which are broadly used in other housing and supportive service programs.

Federal and Military Cost of Living Allowance

HUD proposed revising the IRS definition of ''adjusted gross income'' in § 92.203(b) to require that cost-of-living allowances for federal employees and military personnel in certain areas that are currently excluded from annual gross income by the IRS be included in adjusted gross income calculations when determining eligibility of applicants for HOME assistance. No comments regarding this proposed requirement were received. Section 1914 of the Non-Foreign Area Retirement Equity Assurance Act (Title XIX of Pub. L. 111–84, approved October 28, 2009) is phasing out these cost of living allowances. Consequently, HUD has determined that this regulatory change is not necessary. The language is eliminated in the final rule.

Single Income Definition for Each HOME-funded Program

HUD proposed revising § 92.203(c) to clarify that a participating jurisdiction must designate and implement only one definition of income for each HOME-assisted program (e.g., downpayment assistance program, rental housing program) that it administers.

Comments: A commenter expressed support for this change, but other commenters opposed the clarification and expressed concern that this proposed language would reduce the flexibility of participating jurisdictions, especially those investing in projects with other sources of funding that have different income requirements. A few commenters requested clarification regarding whether all subrecipients and state recipients funded by a participating jurisdiction would be required to adopt the same definition of income. A commenter recommended that HUD allow participating jurisdictions to select an income determination method on a project-by-project basis for rental housing.

HUD Response: HUD agrees that participating jurisdictions should be permitted to determine an income definition on a project-by-project basis for rental housing programs. This approach will reduce administrative burden for participating jurisdictions and project owners by enabling them to better align HOME requirements applicable to individual projects with the requirements of other common funding sources, while still ensuring that all applicants for a specific rental project are treated equally. HUD is adopting the requirement that participating jurisdictions select a single definition of income for use in each program it administers (e.g., downpayment assistance), but has also revised the language at § 92.203(c) to reflect the change related to rental projects. HUD is not adding language to address the question regarding the income definitions that may be used by subrecipients or state recipients receiving HOME funds from a single participating jurisdiction. HUD views each subrecipient's or state recipient's program as distinct. Consequently, a participating jurisdiction can permit the use of different income definitions in these programs. HUD does not find that a regulatory clarification is necessary, but will further address this issue in guidance.

Counting All Household Members' Income

HUD proposed revising § 92.203(d)(1) to clarify that, when determining the annual income of a household to determine eligibility for HOME assistance, the participating jurisdiction must count the income of all persons in the household, including nonrelated individuals.

Comments: A few commenters expressed concern about the use of the terms ''family'' and ''household'' throughout § 92.203, and specifically in the revisions to § 92.203 (d)(1). These commenters requested that HUD define the two terms so that they are identical.

HUD Response: While the terms ''family'' and ''household'' do not have the same meaning (a ''household'' can be comprised of more than one family or multiple, unrelated individuals), HUD acknowledges that the terms are sometimes used interchangeably in statute, regulation, and guidance (i.e., HOME uses the 24 CFR part 5 definition of family at 24 CFR 5.403, but defines household as one or more persons residing in a unit). However, to help ensure that HOME units serve only those who are low-income or very low-income, HUD is clarifying that determinations of annual income include the income of all persons residing in a household. HUD is adopting the proposed rule language at § 92.203 (d)(1) without change.

d. Eligible Activities: General (§ 92.205)

HUD proposed to revise several provisions of § 92.205.

Housing Must Meet Property Standard To Be Eligible

The proposed rule would add language to paragraph (a)(1) to clarify that activities and costs are eligible for HOME funding only if the housing meets the property standards in § 92.251 upon project completion. HUD did not receive specific comments on this clarification and the clarification is retained in the final rule.

Acquisition of Vacant Land or Demolition Are Not Eligible Stand-Alone Activities

To improve the clarity of the regulation, HUD proposed revising § 92.205(a)(2) to specify that the acquisition of vacant land or demolition with HOME funds may be undertaken only with respect to a particular affordable housing project for which construction will begin within 12 months, as established in paragraph (2) of the definition of ''commitment'' in § 92.2.

Comments: Several commenters stated that the 12-month timeframe from commitment to the commencement of construction, which is incorporated in the existing definition of ''commitment'' at § 92.2, is too short.

HUD Response: The provision at § 92.205(a)(2) is intended only to reinforce the existing requirement in the definition of ''commitment.'' The requirement that construction is expected to begin within 12 months is not new. The proposed rule language is adopted without change.

On-Site Manager's Unit

HUD proposed revising § 92.205(d) to address the effect of converting a residential unit to an on-site manager's unit after project completion on the cost allocation and designation of HOME units.

Comments: One commenter stated that the proposed change was appropriate, but also suggested that HUD permit participating jurisdictions to repay HOME funds invested in a unit that must be converted to an on-site manager's unit after project completion. The commenter stated that this alternative would eliminate the need to revise cost allocation to reflect fewer units and avoid problems related to potentially exceeding the maximum per unit subsidy limit.

HUD Response: HUD would consider permitting a participating jurisdiction to make a prorated repayment of HOME funds, in the event that a HOME-assisted unit must be converted to an on-site manager's unit. However, HUD finds that such cases are more appropriately handled administratively, rather than including language to address them in the regulation. HUD is therefore adopting the proposed rule language without change.

Four-Year Project Completion Deadline

HUD proposed changes to § 92.205(e)(2) that would establish a 4-year time period from commitment of HOME funds and set-up of a project in IDIS to complete the project. Projects that are not completed within this timeframe would be deemed terminated before completion and, in accordance with § 92.503, the participating jurisdiction would be required to repay HOME funds invested in the project to its HOME account. The proposed rule would permit participating jurisdictions to request a 12-month extension of the completion deadline by submitting information about the status of the project, steps being taken to overcome any obstacles to completion, proof of adequate funding to complete the project, and a schedule with milestones for completion of the project for HUD's review and approval.

Comments: HUD received many comments on this provision. Commenters opposed the imposition of a project deadline, citing the many delays that can occur in affordable housing development. A few commenters suggested that the timeframe be lengthened to anywhere from 5 years to 8 years. Other commenters suggested that HUD not implement a timeframe for completing projects but rather strengthen up-front project evaluation and feasibility measures to ensure better project selection. Some commenters did not object to the deadline, but opposed the requirement that participating jurisdictions repay HOME funds invested in projects that are not completed. Other commenters suggested that HUD not require repayment in cases where the failure to complete the project was beyond the control of the participating jurisdiction or where the participating jurisdiction is unable to recover the HOME funds expended on the project from the developer.

HUD Response: While recognizing that a large number of HOME program participants do not support the proposed provision establishing a 4-year timeframe for completing a HOME project, HUD continues to maintain that the adoption of this provision is necessary to help ensure that projects proceed timely and that participating jurisdictions do not set up HOME projects in IDIS before the project is ready to move forward. Congress indicated its agreement with HUD's position by legislatively imposing the 4-year timeframe for project completion on projects receiving Fiscal Year 2012 HOME funds.[4] Consequently, HUD is adopting the proposed rule provisions, including the 4-year timeframe for project completion and the 1-year exception authority. The requirement that HOME funds expended on projects that are terminated before completion (and therefore never met HOME affordability requirements) must be repaid, as required by statute, is not new and is also being retained. However, in response to some apparent confusion among commenters, HUD makes minor revisions to paragraph (e) to clarify that the participating jurisdiction, not the project owner, is required to repay its HOME account.

Many commenters opposed the provision because of the length of time that it takes to obtain zoning approval, secure necessary financing, or overcome neighborhood opposition to an affordable housing project. These comments made clear to HUD that many HOME program participants continue to misunderstand the point at which a participating jurisdiction may commit HOME funds to a project. The existing HOME regulations require that, when committing HOME funds to a project, a participating jurisdiction must have a reasonable expectation that construction will begin within 12 months. Further, existing regulations require that a subsidy layering review and cost allocation be performed before commitment of funds and that the written agreement committing funds to a project include a project budget and a detailed construction schedule. Consequently, it has never been permissible to commit HOME funds to a project if delays in zoning or permitting approvals are anticipated, or if other necessary financing has not been secured. The proposed rule attempted to clarify these requirements. HUD is further amending the definition of ''commitment'' at § 92.2 to emphasize that HOME funds cannot be committed to a project (other than as a CHDO predevelopment loan) until financing necessary to complete the project has been secured and a construction schedule that ensures completion within 4 years has been developed. Corresponding changes are being made to the provisions applicable to written agreements with owners, developers, or sponsors of housing at § 92.504(c)(3) to require that written agreements include a schedule that ensures that construction will begin within 12 months and be completed within 4 years.

[4] See Consolidated and Further Continuing Appropriations Act, 2012, Public Law 112–55, 125 Stat. 552, approved November 18, 2011 which imposed, for Fiscal Year 2012, project-related deadlines, underwriting, developer capacity, and neighborhood market adequacy determinations, and CHDO capacity. (See specifically 125 Stat. 684.)

e. Eligible Project Costs and Eligible Administrative and Planning Costs (§ 92.206 and § 92.207)

HUD proposed revising § 92.206(b)(1) to emphasize that it is rehabilitation, rather than refinancing, which is the primary activity that makes refinancing an eligible cost under the HOME program. The proposed rule added language to § 92.206(b)(1) to condition refinancing as an eligible cost to projects in which the cost of the actual rehabilitation is greater than the amount of debt that is refinanced with HOME funds. HUD also proposed amending § 92.206(b)(2) to allow that the eligibility of costs of refinancing existing debt under paragraph (b)(2), as well as the requirement for participating jurisdictions to adopt accompanying refinancing guidelines, are intended to cover all rental housing—multifamily and single family.

Comments: Several commenters recommended that HUD permit the use of HOME funds to refinance existing debt of projects in which minimal or no rehabilitation is taking place. This would permit HOME funds to be used for preservation of affordable housing with little or no need for physical improvements. A commenter recommended that HUD remove the existing prohibition on using HOME funds to refinance existing federal or federally-insured debt (e.g., a loan made with CDBG funds or a FHA-insured loan). No comments were received on the provision that expanded the refinancing guidelines to include single family rental housing.

HUD Response: HUD does not have the authority to permit refinancing of existing debt of properties that are not being rehabilitated. The HOME statute establishes four eligible activities: Acquisition, rehabilitation, new construction, and tenant-based rental assistance. HOME funds can be used to preserve affordable housing through acquisition or acquisition and rehabilitation. Refinancing is not an eligible HOME activity and HOME funds may not be used to refinance existing debt of projects unless rehabilitation is the primary activity taking place. Further, HUD believes that using HOME funds to replace or refinance federal or federally-insured debt that was previously obtained by the owner would be an inappropriate use of limited HOME program resources that could be used to provide additional affordable housing. The proposed rule changes to § 92.206(b)(1) and (2) are adopted without change.

f. Eligible Community Housing Development Organization (CHDO) Operating Expense and Capacity Building Costs (§ 92.208)

HUD proposed a revision to the CHDO operating expense provisions of § 92.208 to clarify that CHDO operating funds are separate from and not intended to supplant CHDO set-aside funds provided under § 92.300(a). CHDO operating funds are to cover general operating costs such as office rents and utilities, staff salaries, and insurance, and are not to be awarded in conjunction with CHDO set-aside funds to pay for project-related soft costs, such as architectural or engineering costs or in lieu of developer's fees. Such costs are eligible to be paid with CHDO set-aside funds.

Comments: Several commenters supported the clarification of the appropriate use of CHDO operating expense funds. A few commenters recommended that HUD mandate that every participating jurisdiction use the full 5 percent of each annual HOME allocation for CHDO operating expenses. Other commenters requested that HUD clarify that the 5 percent of each allocation that may be used for CHDO operating expenses is not part of the 15 percent CHDO set-aside or the 10 percent planning and administration set-aside available to the participating jurisdiction.

HUD Response: HUD finds that the regulation is clear that the 5 percent CHDO operating expense authority is not a subset of either the 15 percent CHDO set-aside or the 10 percent administrative and planning set-aside. HUD does not have the authority to require that each participating jurisdiction use the full 5 percent of each HOME allocation for CHDO operating expenses. NAHA makes clear that participating jurisdictions have the option to use 5 percent of the allocation in this way; however, there is no basis for mandating this use of funds. HUD is adopting the proposed rule language without change.

g. Tenant-based Rental Assistance: Eligible Costs and Requirements (§ 92.209)

Eligible Costs

HUD proposed adding language to § 92.209(a) to expressly permit the payment of utility deposits as an eligible HOME cost when provided in conjunction with HOME tenant-based rental assistance or security deposit assistance.

Comments: A commenter supported the explicit inclusion of utility deposits as an eligible cost, in connection with ongoing tenant-based rental assistance or security deposit assistance. A few commenters suggested HUD further revise the regulation to permit project delivery costs related to tenant-based rental assistance costs to be eligible as project-related soft costs under § 92.206(d), instead of being required to charge them as administrative costs under § 92.207(a).

HUD Response: The existing HOME regulations at § 92.209(a) state that costs associated with administration of tenant-based rental assistance are eligible only as general management and oversight and coordination at § 92.207(a). This language prohibited costs such as annual unit inspections from being charged to a tenant-based rental assistance project. Further, the fact that many participating jurisdictions find the 10 percent administrative set-aside inadequate to cover general program administration costs may constitute a disincentive to undertake a tenant-based rental assistance program, even if needs data and area market conditions indicate that such a program would be an appropriate use of HOME funds. HUD agrees with the commenters that the cost of performing inspections and income determinations should be permitted to be charged as either general management and oversight and coordination under § 92.207(a) or project-related soft costs under § 92.206(d). HUD is therefore adding language to § 92.209(a) to make the cost of conducting unit inspections and determining the income of tenant-based rental assistance applicants or recipients specifically eligible as project-related soft costs for tenant-based rental assistance. HUD is adopting the proposed rule language with respect to the eligibility of utility deposits without change.

Tenant Selection

HUD proposed adding language to § 92.209(c) to clarify that a participating jurisdiction's tenant selection policies and criteria must be based on local housing needs and priorities that are consistent with the participating jurisdiction's consolidated plan. There was support and no opposition to this proposed change, and HUD is adopting the proposed rule language without change.

Preferences for HOME Tenant-Based Rental Assistance

HUD proposed revising § 92.209(c)(2)(i) to clarify that a participating jurisdiction may establish a preference for individuals with special needs (e.g., homeless persons or elderly persons) or persons with disabilities if the specific category is identified in the participating jurisdiction's consolidated plan as having unmet need and the preference is needed to narrow the gap in benefits and services received by such persons. HUD also proposed adding a provision at § 92.209(c)(2)(ii) specifying that participation may be limited to persons with a specific disability, in accordance with the provisions in 24 CFR 8.4(b)(1)(iv), and clarified that participating jurisdictions may not require participation in medical or disability-related services as a condition of receiving HOME tenant-based rental assistance.

Comments: Several commenters support the ability to target HOME tenant-based rental assistance to special needs populations and persons with disabilities. A few commenters provided suggested regulatory language that would establish a specific preference for providing tenant-based rental assistance to households participating in permanent supportive housing programs for disabled persons.

HUD Response: HUD does not agree that a separate provision for establishing a preference for disabled households participating in permanent supportive housing programs is necessary. The proposed rule provisions related to preferences for individuals with disabilities adequately address such situations. Further, HUD carefully drafted the proposed rule language to ensure compliance with all applicable civil rights provisions. HUD is adopting the proposed rule language without change.

Tenant-Based Rental Assistance in Self-Sufficiency Programs

HUD proposed adding language to § 92.209 (c)(2) to specifically address the use of HOME tenant-based rental assistance in self-sufficiency and homeownership programs (including lease-purchase programs), expressly permitting a participating jurisdiction to condition selection for the program and renewal of the tenant-based rental assistance on the household's participation in the self-sufficiency program.

Comments: A few commenters supported the use of HOME tenant-based rental assistance in conjunction with self-sufficiency programs. However, several commenters opposed permitting HOME tenant-based rental assistance in connection with self-sufficiency programs without specifying the basis of their objection. A commenter objected to the use of HOME funds in connection with self-sufficiency programs because tenants who do not fulfill the responsibilities of the program would lose their rental assistance and potentially experience housing instability. Another commenter supported the proposed language, but encouraged HUD to further revise the regulations to permit the escrow of HOME tenant-based assistance funds for self-sufficiency program participants.

HUD Response: HUD's administrative guidance on HOME-funded tenant-based rental assistance has included self-sufficiency programs and lease-purchase programs since 1996. Consequently, the proposed rule provisions were intended as codification of existing policy rather than the authorization of previously prohibited uses. HUD understands commenters' concerns that self-sufficiency program participants may experience housing instability if tenant-based rental assistance is not renewed due to failure to participate in the self-sufficiency program. However, unlike other HOME-funded tenant-based rental assistance programs, a self-sufficiency program is not intended to be a source of permanent housing assistance. In this respect, tenant-based rental assistance provided in connection with a self-sufficiency program is similar to transitional housing, in which occupancy is time-limited and participation in supportive services to facilitate transition to independence is required. HOME funds cannot be deposited in escrow accounts for self-sufficiency participants because the only eligible costs associated with tenant-based rental assistance are rental payments, security deposits, and utility deposits. However, the HOME regulations do not prohibit other funding from being deposited in escrow accounts for recipients of HOME-funded tenant-based rental assistance. HUD is adopting the proposed rule language without change.

Other Proposed Changes

HUD proposed: (1) Adding a provision to redesignated § 92.209(c)(2)(v) to specifically prohibit the exclusion of persons who are given preferences for HOME assistance from participating in any other program of the jurisdiction; (2) revising § 92.209(g) to make explicit that all tenants must have a lease and that the lease must comply with the requirements that are already cross-referenced in the existing provision; (3) revising § 92.209(h)(3)(ii) to replace the existing description of one alternative for establishing the amount of rent for a unit with a cross-reference to the regulations in 24 CFR part 982, which govern the HCV program; and (4) making a technical change to § 92.209(l) to clarify that the provision applies whenever HCV assistance becomes available, rather than just when it becomes available ''to a participating jurisdiction.'' HUD did not receive comments on these proposed revisions and is adopting the proposed rule language without change.

h. Troubled HOME-Assisted Rental Housing Projects (§ 92.210)

HUD proposed adding a new § 92.210 to the HOME regulations, establishing provisions that facilitate participating jurisdictions' efforts to preserve HOME-assisted housing projects that have become financially unviable and, as a result, are at risk of failure or foreclosure.

Comments: Many commenters supported the addition of these provisions. A commenter opposed the provisions, stating that the decision to reduce the number of HOME units in a troubled project belongs solely to the property owner and the participating jurisdiction and should not involve HUD. Another commenter asked that HUD provide guidance on the process for obtaining approval to reduce the number of HOME units in a project. Several commenters urged HUD to define what constitutes a troubled project more broadly to include projects suffering from physical deterioration. Other commenters urged HUD to vest approval authority relative to project workouts with HUD field offices rather than in Headquarters. Several commenters urged HUD to explicitly include refinancing of existing debt as an eligible use of HOME funds in a work-out situation. A commenter recommended that HUD make initial capitalization of replacement reserves eligible for all HOME rental projects. Another commenter urged HUD to specify that the maximum per unit subsidy limit that applies to HOME-assisted units receiving additional HOME funds during the period of affordability be the limit in effect at the time of the additional investment rather than the initial commitment of HOME funds. Other commenters urged HUD to require that the existing period of affordability be extended on all projects that receive additional HOME funds. Another commenter recommended that HUD not require an extension of the affordability period for any project receiving additional HOME funds during the period of affordability, irrespective of the amount of HOME funds being invested.

HUD Response: Under the existing HOME regulations, a participating jurisdiction would be required to obtain a waiver of § 92.504(a)(1) in order to reduce the number of HOME-assisted units that were originally designated. The purpose of the change offered by the proposed rule was to permit this reduction to occur without a waiver. However, HUD has an obligation to ascertain that a reduction involves only units that were designated in excess of the minimum, will not unduly burden low-income tenants, and is both necessary to preserve the unit and more effective than other potential options for preserving the project's viability. Consequently, it is necessary for HUD to approve any plan to reduce the number of HOME-assisted units in a project. Additionally, it remains HUD's position that the authority to approve workouts overall, as well as the authority to execute Memoranda of Agreement with participating jurisdictions on behalf of HUD, is appropriately placed in HUD Headquarters.

The use of additional HOME funds to refinance existing debt would be permissible under the proposed rule language. However, HUD chose not to list this use because the use of HOME funds for this purpose is relatively rare. In instances where HOME funds were used to refinance existing debt, it would be necessary for the participating jurisdiction to designate all the units in the project as HOME-assisted, which may not be desirable or practicable in many circumstances. Consequently, HUD is not adding refinancing of existing debt to the uses listed in § 92.210(b). HUD agrees that the maximum per unit subsidy limit applicable to a project receiving additional HOME funds should be the limit in effect at the time that the funds are added. HUD has opted not to revise the regulation to clarify, but will include this provision in administrative guidance.

HUD disagrees with commenters who urged that the period of affordability always be required to be extended if the project receives additional HOME assistance and those who stated that the period of affordability never be extended on such a project under any circumstance. HUD's experience related to troubled project workouts has been that flexibility is essential to success. Many participating jurisdictions already impose periods of affordability that greatly exceed the required minimum periods in § 92.252. Alternately, some projects may face market or physical conditions that make an extended period of affordability unworkable or unrealistic. The minimum period of affordability required by HUD in a workout will never be less than the minimum period required under the regulations based upon the total of the initial and subsequent per unit HOME investment. Although HUD's preference is to extend affordability periods whenever practicable, it declines to make the requested change in order to preserve the flexibility necessary to achieve successful workouts.

i. HOME Funds and Public Housing (§ 92.213)

HUD proposed adding a new § 92.213 to the HOME regulations to address the use of HOME funds with public housing funds. The use of HOME funds in public housing projects, and, in particular, the use of HOME funds in HOPE VI projects is an area that would benefit from further regulatory elaboration, given that HOME funds and public housing funds are each governed by separate statutes and NAHA prohibits the use of HOME funds to provide assistance authorized under section 9 of the United States Housing Act of 1937 (Public Housing Capital and Operating Funds). This prohibition is reflected in paragraph (a) of § 92.213, which prohibits the use of HOME funds for public housing modernization or operating assistance. This provision also prohibits a HOME-assisted unit from receiving Operating Fund or Capital Fund assistance under Section 9 during the period of affordability. With respect to the development of new public housing, paragraph (a) also makes clear that HOME funds cannot be used for public housing units, whether funded under section 9 or another source. Paragraph (b) of § 92.213 establishes an exception to this prohibition that permits the use of HOME funds to develop a unit that receives funds for development under section 24 (HOPE VI), so long as no Capital Funds are used to develop the unit. Paragraph (c) of § 92.213 makes clear that HOME funds may be used to develop or rehabilitate affordable housing units that are not public housing units in projects that also contain public housing units funded by Section 9, HOPE VI, or other funds.

Comments: While a few commenters supported the provision, the majority of commenters commenting on this provision opposed the provision stating that the primary activity of many HOPE VI projects has been to demolish public housing units and replace them largely with market-rate LIHTC units leaving only a small percentage of units as public housing. A commenter stated that the National Affordable Housing Act (NAHA) prohibits the use of HOME funds for any public housing purpose. The commenters that supported the inclusion of the provision requested further clarification on the interplay of HOME funds, HOPE VI funds and public housing funds. Another commenter welcomed the inclusion of the provision stating that this interpretation had previously only been available through guidance. Other commenters expressed uncertainty over how the statutory rent provisions applicable to HOME-assisted units could be met in a public housing unit and requested that HUD provide additional guidance .

HUD Response: HUD included a new provision in the proposed rule to clarify the permissible and impermissible uses of HOME and HOPE VI funds in the development and management of public housing units. The provision offered by HUD is based upon a longstanding legal interpretation of the three statutes: The HOME authorizing statute, the HOPE VI authorizing statute and the 1937 Act. HUD was not presenting a policy option but rather clarifying the statutory parameters governing the eligible uses of these funds. The commenters who opposed this language appeared to oppose the language more on the basis of policy as opposed to disagreement with HUD's statutory interpretation. HOME funds are not statutorily prohibited from being for any public housing purpose, but are specifically prohibited from being used ''to provide assistance authorized under section 9'' and ''to carry out activities authorized under section 9(d)(1)'' of the 1937 Act (public housing capital fund and operating fund). There is no statutory prohibition on using public housing operating assistance or public housing capital fund assistance for units that were developed with HOME and HOPE VI funds, authorized under section 24 of the 1937 Act, and are operated as public housing.

The HOME Program was established to stimulate public-private partnerships to develop affordable housing, but the HOME authorizing statute specifically excluded from such partnerships combining HOME funds with public housing operating or capital funds for the operation, modernization or development of public housing under sections 9 and 14. As explained in the Senate report accompanying S.566 (the bill that became NAHA and authorized the HOME program) ''These prohibitions are made necessary by the Committee's intent that [HOME] be a new initiative focused on expanding public and private investment for more affordable housing and not just a general fund for undifferentiated federal housing assistance'' (S. Rep. 101–316, June 8, 1990, at 51). This prohibition remained in place even after section 9 of the 1937 Act was significantly revised by the Quality Housing and Work Responsibility Act (QHWRA) (Pub. L. 105–276, approved October 21, 1998) to establish the public housing operating and capital funds. The general HOME prohibition on use for activities ''under section 9'' remained in place, and the provision prohibiting use under section 14 was amended to reflect the new capital fund provision—section 9(d)(1)—and expanded the explicit prohibition on using HOME funds for public housing capital investments. However, Section 535 of QHWRA added a new section 24 to the 1937 Act (42 U.S.C. 1437v) to establish the HOPE VI program that is in operation today, and QHWRA did not preclude combining HOME funds with HOPE VI funds in the development and management of affordable housing.

The HOME rule is consistent with these provisions and does not allow HOME funds to be used for public housing units, except to develop units under section 24 of the 1937 Act. Units developed with both HOME and HOPE VI may receive operating assistance and may subsequently receive Capital Funds for rehabilitation or modernization under section 9 of the 1937 Act. Once developed, public housing units may not receive HOME funds, and HOME-assisted housing units may not receive Operating Fund or Capital Fund assistance under section 9 of the 1937

Act during the HOME period of affordability.

HUD agrees that clarification of how HOME rent requirements of § 92.252(a) and (b) affect the tenant and operating payments of public housing units is appropriate. Therefore, a new paragraph (d) is added to provide the requested clarification.

j. Prohibited Activities and Fees (§ 92.214)

Prohibition of Certain Fees

HUD proposed several revisions to § 92.214(b) for the purpose of clarifying the prohibition against program participants charging fees to cover their administrative costs and that the amount of application fees charged must not create an undue impediment to a low-income family, a jurisdiction, or other entity's participation in the participating jurisdiction's HOME program. HUD also proposed a new provision at § 92.214(b)(2) prohibiting owners of HOME-assisted rental projects from charging fees to tenants that are not reasonable or customary.

Comments: One commenter stated that the prohibition on the inclusion of the term ''other fees'' in the prohibition at § 92.214(b)(1) will have the effect of disallowing developer fees and fees paid to construction contractors and subcontractors for overhead and profit, as well as fees paid to other HOME-funded contractors such as property inspectors, cost estimators, architects, engineers, real estate brokers and others. The commenter stated that the rule should expressly allow these fees, as long as they are reasonable and the services are properly procured. Several commenters questioned the use of the term ''program participants,'' stating that it was unclear what entities were covered by the term. Other commenters stated that participating jurisdictions should be permitted to charge origination fees for HOME loans, as well as servicing fees. A few commenters identified an apparent contradiction between § 92.214(b)(2) and the written agreement provisions at § 92.504(c)(3)(xi), which require inclusion of a prohibition on parking fees in the written agreement between the participating jurisdiction and the owner or developer of HOME-assisted housing.

HUD Response: HUD does not agree that the inclusion of the term ''other fees'' would prohibit developer fees, contractor overhead and profit, and fees for professional services, such as architectural and engineering services, all of which are expressly eligible costs under § 92.206(d). Paragraph § 92.214(b) clearly states that it applies to fees charged to cover the cost of administering the program. However, HUD does agree that the use of the term ''program participant'' in this section is unclear and may have led to misinterpretation of the requirements. HUD is amending the rule to remove the term ''program participant'' and add CHDO to the list of entities covered by this prohibition. HUD has also revised § 92.214(b)(1) to further clarify the circumstances under which the participating jurisdictions, subrecipients, and state recipients may charge certain fees.

Fees for Ongoing Monitoring of HOME Rental Projects

HUD also proposed revising § 92.214(b)(1) to eliminate the prohibition against monitoring fees and expressly permitting participating jurisdictions to charge fees to owners of HOME rental housing to cover the cost of ongoing monitoring, financial oversight, and physical inspection during the period of affordability.

Comments: HUD received many comments supporting this proposed change. Some commenters suggested that HUD ensure that monitoring fees are reasonable and do not jeopardize the affordability of the property to the residents, particularly extremely low-income tenants. A few commenters stated that it was unfair to charge fees to property owners, because the owners have no control over the amount of the fee. Other commenters objected to HUD's stated position in the preamble that monitoring fees could only be charged to projects that received a commitment of HOME funds on or after the effective date of a final rule. These commenters stated that participating jurisdictions should be permitted to charge monitoring fees on all rental projects under a period of affordability. Other commenters expressed concern about how to determine a monitoring fee that is reasonable and requested guidance from HUD. A commenter stated that HUD should allow participating jurisdictions to charge ongoing monitoring fees to homeowners who receive HOME homebuyer or rehabilitation assistance. Several commenters urged HUD to adopt elements of the Rental Alignment Demonstration and permit participating jurisdictions to rely on monitoring performed by other entities, as long as that monitoring met all HOME requirements.

HUD Response: HUD recognizes that many participating jurisdictions would like to impose monitoring fees on existing HOME rental projects. However, HUD's position is that it is neither prudent nor practicable to permit fees to be imposed on projects where the written agreement does not include a required monitoring fee and the underwriting did not include payment of annual monitoring fees. HUD does not agree that it is appropriate to permit ongoing monitoring fees to be charged to low-income homebuyers and homeowners, and notes that ongoing physical inspections, income determinations, and financial assessments are not required for homeownership projects. HUD shares commenters' concerns about ensuring that monitoring fees charged to rental projects are reasonable. Monitoring fees on LIHTC projects vary widely and, in some states, do not appear to be related to the actual cost of compliance activities performed. Consequently, adoption of a state's LIHTC monitoring fee in a state as a HOME monitoring fee would not be reasonable in some states. HUD is revising this section to require that participating jurisdictions base their monitoring fees on an estimate of the average per unit staff time and materials consumed by compliance monitoring to ensure that the fees charged are not excessive and are based upon the actual cost of performing the compliance monitoring function. Participating jurisdictions will be required to document the basis on which they calculated their fee and retain this documentation for monitoring by HUD. Participating jurisdictions will also be required to ensure that the amount of the annual fee is included in the underwriting of the project. HUD will issue additional guidance regarding developing fee schedules.

k. Match Credit (§ 92.221)

HUD proposed adding a new paragraph (d) to § 92.221 requiring that a contribution to HOME-assisted or HOME-eligible homeownership projects must be valued not at face value, but by the amount by which it reduced the sales price to the homebuyer. Contributions that are included in a homebuyer's mortgage (e.g., donated land or construction materials) would not count as a match contribution.

Comments: Several commenters opposed the provision, stating that it would require them to lower sales prices on units in order to count these contributions as match. Some commenters raised concerns that lowering prices would have detrimental effects on neighborhood housing markets, particularly in distressed communities. Other commenters were concerned that they would not be able to meet the minimum match requirement if the new provisions are adopted. Several commenters stated that contributions to homebuyer housing that are included in the homebuyer's mortgage serve the important purpose of enabling the housing developer to roll the value of the contributions forward into the next affordable homebuyer unit it develops. Other commenters stated that limiting match to contributions that reduce the price of the housing to the homebuyer ignores the fact that these contributions often write-down the development cost of a unit so that it can be sold to a low-income household at fair market value.

HUD Response: HUD has carefully considered the commenters' concerns and has revised the proposed rule to balance those concerns with the requirement that match consist of permanent contributions that facilitate development and enhance affordability of HOME-assisted and other match-eligible housing. In response to comments, HUD has revised the final rule to make a distinction between contributions to the development of affordable housing and contributions that directly benefit low-income homebuyers. Under this approach, there will be no change to the eligibility of contributions that directly benefit the homebuyer (e.g., downpayment or closing cost assistance from non-federal sources, the yield foregone on below-market interest rate mortgage financing, the direct cost of donated homebuyer counseling). However, in order to count as a match contribution, this final rule requires that contributions to the *development* of homebuyer also benefit the homebuyer in one of two ways. Contributions to the development of housing could include: Cash or below-market interest rate construction financing, forbearance of fees, donated real property, housing bond financing provided to a project developer, donated site preparation and construction materials, and donated labor or professional services. The contribution must either reduce the sale price of the housing below fair market value, or if the development cost of a unit exceeds the market value, by enabling the unit to be sold for less than the cost of development. In either case, a contribution can be credited to the extent that it reduced the sale price below fair market value or the cost of development.

l. Match Reduction (§ 92.222)

HUD proposed revising § 92.222(b) so that HUD would take the extent of a disaster's fiscal impact on a participating jurisdiction into account when determining whether to grant the reduction, as well as the amount and duration of any match reduction.

Comments: A commenter requested that HUD clarify how it will make this determination.

HUD Response: As indicated in the preamble of the proposed rule, HUD plans to issue administrative guidance regarding the factors HUD will consider and the information that the participating jurisdiction should submit with its match reduction request.

m. Maximum Per-unit Subsidy Amount, Underwriting, and Subsidy Layering (§ 92.250)

Maximum per Unit Subsidy Limits

HUD proposed revising § 92.250(a) to clarify that the maximum HOME per-unit subsidy may not be increased above 240 percent of the base limits authorized by section 221(d)(3)(ii) of the National Housing Act (12 U.S.C. 17151(d)(3)(iii), despite the fact that section 221 of the General Provisions of Title II, Division K of the Consolidated Appropriations Act, 2008 (Pub. L. 110–161, approved December 26, 2007) increased the maximum exceptions that HUD may grant for the 221(d)(3) mortgage insurance program to up to 315 percent of the base limits. The clarification was determined necessary because section 212(e) of NAHA, which establishes the 221(d)(3) mortgage insurance limits as the per-unit cost limits for HOME-assisted units, was not amended and continues to limit HOME subsidy to the lesser of a participating jurisdictions' actual high cost percentage or to 240 percent of the base limit. HUD did not receive any comments on this provision and is adopting the proposed rule language without change.

Subsidy Layering, Underwriting, and Market Analysis

HUD proposed revising § 92.250(b) to require participating jurisdictions to: (1) Evaluate subsidy layering and conduct or examine the underwriting of all projects to ensure that the HOME subsidy is not excessive and does not result in an undue or excessive return to the owner; and (2) adopt underwriting and subsidy layering guidelines that include an assessment of, at minimum, the market conditions of the neighborhood in which the project will be located, the experience of the developer, the financial capacity of the developer, and firm financial commitments for the project.

Comments: Many commenters supported these proposed additions to the regulations, citing the importance of sound underwriting and adequate market need to making affordable housing viable. However, other commenters cited concerns about the added burden, cost, and complexity of the new requirements. A number of commenters urged the Department to permit participating jurisdictions to accept the underwriting and subsidy layering conducted by other funders. Several commenters stated that the proposed rule would require a full-scale market analysis for every project, even individual homebuyer units. A few commenters asked for clarification of what would constitute an acceptable assessment of neighborhood market conditions for projects of different sizes and types (e.g., homeownership, special needs). Other commenters requested clarification about whether subsidy layering and underwriting requirements applied to homebuyer projects.

HUD Response: HUD recognizes that the proposed requirements will result in additional burden for those participating jurisdictions that are not already engaging in these practices. However, requiring these practices for all participating jurisdictions is intended to ensure successful and timely completion of HOME projects, reduce the possibility of undue enrichment of project owners, and ensure that HOME funds are used for projects for which there is adequate demand. HUD's interest in safeguarding and optimizing scarce taxpayer funds justifies any additional burden that may arise from these requirements. HUD is adopting the proposed provisions, but has added a new paragraph (3) that explicitly states that these provisions do not apply to owner-occupied rehabilitation projects where assistance is provided as a grant or to homebuyer assistance projects that do not involve development or rehabilitation of housing (e.g., downpayment assistance). These requirements apply to homebuyer projects that involve development activities. To improve clarity of the provision, HUD is revising the language at § 92.250(b)(2) to eliminate the phrase ''market conditions'' with ''current market demand in the neighborhood.'' For the same reason, this paragraph is being revised to specify that firm financial commitments must be made in writing.

HUD will issue guidance on these requirements. However, it is important to clarify that not all HOME projects will require a full-scale market analysis and that the market area for projects of various sizes or other characteristics varies. While such analyses are appropriate for large-scale developments, assessing market conditions in the case of smaller projects will be considerably less burdensome. The purpose of the requirement is to ensure that there will be adequate market demand for a project before committing HOME funds.

HUD has determined that additional guidance on the applicability of these requirements to specific types of projects is necessary. This final rule makes explicit that an underwriting analysis is only required for owner-occupied rehabilitation projects if the HOME-funded rehabilitation loan is amortizing; participating jurisdictions will not be required to perform underwriting analyses of HOME-funded grants or deferred, forgivable loans to owner-occupants seeking rehabilitation assistance. This rule also makes clear that participating jurisdictions will not be required to perform neighborhood market analyses or evaluate developer capacity for owner-occupied rehabilitation projects or projects involving the provision of HOME-funded downpayment assistance, but no HOME–funded development. New paragraphs § 92.250(b)(3) and (4) have been added to provide this clarification.

n. Property Standards (§ 92.2 and § 92.251)

HUD proposed substantial revisions to the property standards applicable to HOME-assisted properties. The proposed changes to § 92.251 reorganized the section and established new requirements for HOME-assisted projects involving new construction, rehabilitation, acquisition of standard housing, manufactured housing, as well as ongoing property condition standards for HOME-assisted rental housing. In the final rule, the standards for rehabilitation projects, in § 92.251(b), were reorganized and revised to reflect public comment and to clarify misunderstandings of the proposed requirements.

Definitions (§ 92.2)

HUD proposed to add definitions for ‘‘observed deficiency (OD)’’ and ‘‘Uniform Physical Condition Standards (UPCS)’’ to § 92.2.

Comments: A few commenters were concerned with the context of the term ‘‘observed deficiency’’ in connection with UPCS. The commenters noted that the proposed definition only addresses technical standards (i.e., routes, widths of main entrances, interior halls, and outside common areas). The commenter suggested that participating jurisdictions should be required to inspect for compliance with the Fair Housing Act, Section 504 of the Rehabilitation Act of 1973, and Americans with Disabilities Act (ADA) standards for structural accessibility.

HUD Response: With the revisions to the property standards in § 92.251, HUD is eliminating the definition of ‘‘observed deficiency. That term is no longer used in § 92.251 and as used in § 92.504(d) refers to the participating jurisdiction's property standard rather than to UPCS. Under the participating jurisdiction's property standards, pursuant to § 92.251(a)(2)(ii) and (b)(2)(v), the housing must meet the accessibility requirements of 24 CFR part 8, which implements Section 504, and Titles II and III of the Americans with Disabilities Act (42 U.S.C. 12131–12189) implemented at 28 CFR parts 35 and 36, as applicable. Covered multifamily dwellings must also meet the design and construction requirements at 24 CFR 100.205, which implements the Fair Housing Act.

Written Standards for Methods and Materials for New Construction Projects (§ 92.251(a))

Comments: A few commenters supported the proposed requirement in § 92.251(a)(v) to establish written standards for methods and materials for new construction projects. Other commenters, however, opposed the requirement to establish written standards for new construction when using HOME funds. The commenters stated that this requirement is burdensome, especially for small participating jurisdictions; will require significant resources to develop; and is not feasible for participating jurisdictions with limited capacity, housing construction expertise, and administrative budgets. For new construction building activity, several commenters argued that the development of written standards for methods and materials is unnecessary because state and local codes for new construction, as well as the International Residential Code (IRC) and International Building Code (IBC), provide sufficient specificity such that scopes of work can be developed using these codes. Some commenters expressed concern that this requirement will do little to improve housing quality, and if participating jurisdictions do not do a good job in developing standards, this could generate sub-optimal development practices and potential liability issues for participating jurisdictions, or could void manufacturer's warranties. Some commenters suggested allowing participating jurisdictions to rely on standards imposed by other public agencies, such as agencies that administer LIHTC, as participating jurisdictions are already familiar with these standards. Several commenters requested more information about what HUD envisioned would be in written methods and materials and asked that HUD provide training, guidance, templates with recommended minimum standards, and other technical assistance from HUD to help participating jurisdictions implement this requirement.

HUD Response: HUD acknowledges the concern expressed by many commenters about the requirements for written standards for methods and materials. With respect to HOME-funded new construction projects, HUD agrees with the commenters that its proposal would be duplicative to require participating jurisdictions to establish written standards for methods and materials solely for new construction of HOME-assisted projects that are separate from codes already established. The final rule requires new construction of HOME-assisted projects to meet all applicable state and local building codes, or in the absence of such codes, the IRC or IBC, as applicable. HUD has determined that these codes provide sufficient detail to establish the materials and methods for new construction. Therefore, at this final rule stage, separate written standards for methods and materials will not be required for new construction activity. This requirement in § 92.251(a)(2)(v) is removed in the final rule.

Rehabilitation Projects (§ 92.251(b))

The proposed regulation required the participating jurisdiction's property standards for rehabilitation projects to describe, in detail, the scope of the rehabilitation that may be performed and the participating jurisdiction's written requirements for the design, amenity, and materials, beyond that which is contained in the local code (i.e., written methods and materials). The rehabilitation standards must establish the requirements for the minimum acceptable product that the rehabilitation completes, and a basis for a uniform inspection of the rehabilitated housing.

In the final rule, HUD reorganized and revised language in § 92.251(b) to clarify the requirements for rehabilitation standards for HOME-assisted projects. The final rule requires that a participating jurisdiction's rehabilitation standards must include requirements to: Address health and safety defects immediately; determine the useful life cycle of major systems in both rental and owner-occupied housing and appropriately fund replacement reserves to address capital repair and replacement needs; meet existing lead-based paint and accessibility laws and regulations; rehabilitate HOME-assisted projects to mitigate the impact of potential disasters; ensure that the housing meets all applicable state and local codes, ordinances and zoning requirements upon completion of rehabilitation; correct all critical deficiencies from the list of Observable Deficiencies in UPCS that HUD requires to be included in a participating jurisdiction's standards: Review construction cost estimates, contracts and related documents; conduct construction progress and final inspections to ensure that the work performed is in compliance with all requirements and establish requirements for the frequency of these inspections. The requirements of § 92.251(b) apply to the rehabilitation of HOME assisted rental housing projects and homebuyer acquisition and rehabilitation projects, as well as homeowner rehabilitation.

State and Local Codes, Ordinances, and Zoning Requirements

Comments: Commenters requested that HUD clarify how participating jurisdictions could meet the proposed requirement in § 92.251(b)(1) that rehabilitated HOME-assisted projects meet state and local codes and ordinances if the state or local jurisdiction has no such codes or ordinances that apply to rehabilitation work where the project is located.

HUD Response: The final rule at § 92.251(b)(1) requires that, upon completion, all rehabilitation work performed on HOME-assisted projects must meet all state and local codes, ordinances, and requirements. In the absence of state or local building codes that address rehabilitation, the work must meet the International Existing Building Code (IEBC). In general, the IEBC provides alternative approaches to the IBC and IRC with respect to remodeling, repair, or alteration of existing buildings, as many existing buildings cannot comply with building code requirements for new construction. However, the IEBC does contain basic health and safety requirements for the rehabilitated building, such as requirements for fire prevention, structural or other life safety features. HUD plans to provide training and technical assistance to address the need for training on these new requirements and coordinate across HUD to develop model rehabilitation standard checklists. In addition, HUD will issue a notice that identifies which of the observable deficiencies in UPCS that participating jurisdictions must be corrected as part of the rehabilitation standards they adopt.

Proposed Use of UPCS in the HOME Program

Comments: Several commenters opposed the proposed use of UPCS in the HOME program, expressing concern about the administrative burden and expense of using UPCS and suggesting retention of Housing Quality Standards (HQS). Commenters requested training and guidance on the new standards before the requirements take effect. A few commenters were concerned that the additional standards and necessary repairs would cause delays and prevent real estate transactions from moving forward, and requested a reasonable period of transition to UPCS. A commenter recommended that the 2009 International Property Maintenance Code be used as a standard for rental activities in rural areas rather than UPCS. Several commenters requested that HUD clarify whether inspection procedures of HUD's Real Estate Assessment Center (REAC) would be required.

Some commenters supported the use of UPCS for rental properties, but suggested that the UPCS standards should not apply to owner-occupied homeowner rehabilitation. Some commenters requested that HUD clarify the difference between UPCS, standards in state and local codes, and the proposed required rehabilitation standard that prescribes the methods and materials to be used in rehabilitation activities.

HUD Response: For HOME-assisted rental housing projects, HUD has determined that the use of UPCS will result in better housing quality and long-term viability of HOME-assisted units than HQS, because UPCS includes a more comprehensive list of inspectable items and areas than HQS. The existing regulations require that all HOME-assisted rental units meet applicable state and local codes, this is a statutory requirement and is not changed in this final rule. In addition, the existing regulations require that in the absence of such state or local codes, HQS must be used as the property condition inspection protocol to meet the requirement for inspections of HOME-assisted rental housing. In the final rule, instead of using HQS in the absence of applicable state or local codes, UPCS must be used as the property condition inspection protocol when there are no applicable state or local codes. The use of UPCS as an inspection protocol for ongoing property inspections could facilitate alignment inspections of HOME-assisted units with other federal housing programs. For example, UPCS is used to conduct inspections in many of HUD's rental housing programs and is familiar to HUD housing providers participating in these programs. Further, UPCS is used to conduct inspections in the LIHTC program, which is frequently a funding source in HOME-assisted rental housing. HUD and other federal agencies are currently engaged in a pilot program to examine ways to align the property inspections required by different housing programs. If this alignment is achieved, it will promote coordination at the local level and may promote cost savings.

HUD will issue guidance specifying which inspectable items and areas in UPCS must be included in these inspections. Where the 2009 International Property Maintenance Code has been adopted as the state or local code, participating jurisdiction would incorporate those requirements in the standards they establish to meet the requirements of § 92.251(f).

In the final rule at § 92.251(b)(1)(viii), HUD also clarifies how deficiencies listed in UPCS are incorporated into a participating jurisdiction's rehabilitation standards. HUD agrees that not every deficiency would be required to be addressed for all HOME-assisted rehabilitation. Based on the list of inspectable items and areas in the UPCS, HUD will establish which critical deficiencies must be corrected as a minimum requirement for each type of rehabilitation—rental, homebuyer, and homeowner housing—and, therefore, must be included in the participating jurisdiction's rehabilitation standards.

HUD disagrees that the UPCS standards should not apply to owner-occupied homeowner rehabilitation. Although the current regulation requires that HOME-funded homeowner rehabilitation correct all property code violations, HUD has found that in many instances, the completed housing units did not meet the existing property codes and that all health and safety defects were not removed. Along with existing state and local property condition and building codes, or the IEBC, the use of UPCS inspections on completed HOME-funded homeowner rehabilitation will help assure that these units are free of life-threatening conditions, as well as health and safety defects, and meet minimum quality standards. HUD will issue guidance that establishes which observed deficiencies in homeowner rehabilitation, from the list of inspectable items and areas in UPCS, must be included in a participating jurisdiction's rehabilitations standards and corrected as part of HOME-funded homeowner rehabilitation.

To clarify the difference between codes such as the IEBC or local building codes and UPCS, UPCS is an inspection protocol that is used to evaluate the condition of housing. In this final rule, HUD is requiring participating jurisdictions to use this inspection protocol to establish minimum property condition standards for rehabilitation standards, (e.g., if certain deficiencies are observed as part of the UPCS inspection, then the housing must be rehabilitated to correct them). HUD previously issued guidance regarding written rehabilitation standards and how they differ from property standards in HOMEfires Vol. 3, No. 1, January 2001, which is posted on HUD's Web site.[5]

Many commenters misunderstood the proposed use of UPCS in inspecting HOME-assisted units and believed HUD proposed that participating jurisdictions adopt existing REAC inspection procedures and protocols (i.e., item weight, scoring, and level of criticality). As stated earlier, HUD proposed to use UPCS for property condition inspections and as part of rehabilitation standards in the HOME program. Use of certified REAC inspectors is not required. Further, participating jurisdictions, subrecipients, and state recipients are not required to use their own staff to conduct the inspections; they may contract with third parties to do so. HUD is aware that some participating jurisdictions are not familiar with UPCS, and agrees with commenters that a transition period and training would be helpful. The final rule delays the effective date of the provisions of § 92.251 by 18 months so that HUD may develop additional guidance to facilitate an efficient transition to the new requirements.

Written Standards for Methods and Materials for Rehabilitation Standards (§ 92.251(b)(2)(i))

Comments: Some commenters expressed concern that the proposed rule was not sufficiently clear about what is required in § 92.251(b)(2)(i) with respect to written methods and materials for rehabilitation standards. Commenters asked that HUD provide training, guidance, templates with recommended minimum standards, and other technical assistance to help participating jurisdictions implement this requirement. A commenter stated that while HUD requires participating jurisdictions to meet all applicable state and local codes, not all jurisdictions have rehabilitation codes, and asked that HUD make clear that rehabilitation work is not required to meet the same standards as new construction. Other commenters recommended relying on other public entities or federal funders for these standards.

HUD Response: This final rule requires participating jurisdictions to adopt written standards for methods and materials for rehabilitation of HOME-assisted projects, as part of the required rehabilitation standards found in § 92.251(b)(1). Over the history of the program, HUD has found that numerous participating jurisdictions have not made determinations of whether rehabilitation performed with HOME funds was adequate. The adoption of written methods and materials, which are sometimes referred to as specifications and include details such as the grade of lumber to be used, the number of nails per square foot, the type of material that can or cannot be used for doors serving as fire exits, the distribution pattern and material of roofing tiles, will improve the quality of rehabilitation performed with HOME funds. This final rule clarifies that participating jurisdictions may adopt written standards for methods and materials for rehabilitation work that are part of applicable national, state or local codes, or may establish standards that exceed the minimum requirements of these codes.

Health and Safety Issues

The proposed rule required that the participating jurisdiction's rehabilitation standards must address health and safety issues.

Comments: A commenter suggested that the property standards language should reference the National Fire Protection Association (NFPA) 101, *Life Safety Code* or NFPA 5000, *Building Construction and Safety Code,* and include several specific requirements to address fire safety objectives. A few commenters requested that HUD provide specific standards to cover health and safety inspection items. Some commenters suggested that HUD expand its definition of property standards to incorporate the principles of healthy and safe housing, broaden the rule beyond life-threatening deficiencies, and include specific examples of eligible safety and healthy homes improvements in the rule, such as installation of handrails, grab bars in bathrooms, improved lighting, kitchen exhaust fans, ventilation systems, removal of mold, repair of deteriorated paint, and promotion of integrated pest management.

HUD Response: HUD previously issued guidance that addresses implementation of the Fire Administration Authorization Act of 1992 in CPD Notice 94–05, which applies to HOME-assisted housing and is posted on HUD's Web site.[6] This guidance prohibits the use of housing assistance in connection with certain assisted and insured properties, unless certain NFPA fire protection and safety standards are met. While HUD agrees with the importance of healthy and safe housing, the specific examples provided by commenters do not fall under the category of required property standards. However, they are already HOME-eligible costs covered under § 92.206. In accordance with 24 CFR 5.703(f), UPCS also specifically addresses health and safety concerns. To clarify the health and safety requirements, HUD is revising the language in § 92.251(b)(1)(i) to remove the first sentence, which is already covered in § 92.251(f)(1)(ii), and state that a participating jurisdiction's rehabilitation standards must address, not just identify, life-threatening health and safety deficiencies immediately if the property is occupied.

Useful Life of Major Systems and Capital Needs Assessments

The proposed rule required that the remaining useful life of each major system be 15 years, at a minimum, after project completion, or the major system must be rehabilitated or replaced to have a minimum useful life of 15 years. A capital needs assessment would be required for all multifamily rental projects with 26 or more total units and determine the useful life of major systems with a capital needs assessment. For owner-occupied housing undergoing rehabilitation with HOME funds, the participating jurisdiction would be required to ensure that each major system has a remaining useful life of at least 5 years at the time the project is completed; major systems with a useful life of less than 5 years after project completion would be required to be rehabilitated or replaced to meet this requirement.

Comments: Some commenters supported the requirements for major systems as proposed. Other commenters questioned who would determine the life expectancy of major systems and by what method, what documents would be required to be maintained, whether a capital needs assessment serves as a reliable tool to determine when major

[5] See *http://www.hud.gov/offices/cpd/affordablehousing/library/homefires/volumes/vol3no1.cfm.*

[6] See *http://www.hud.gov/offices/cpd/lawsregs/notices/priorto95/cpd9405.pdf.*

systems need to be replaced, and whether major systems with a significant remaining useful life (e.g., 10–15 years) must be replaced. Several commenters opposed these requirements and stated that repairing or replacing major systems with a remaining useful life shorter than 15 years may be unnecessary, inefficient, wasteful, unsustainable, and cost prohibitive. Many commenters suggested that capitalized replacement reserves, achieved through adequate underwriting, could be used to fund repairs and replacements of major systems in rental housing in the future when necessary. Several commenters suggested that HUD permit HOME funds to be used to fund a replacement reserve in anticipation of future needs. A few commenters suggested that HUD should provide additional time beyond acquisition to reach the 15-year remaining useful life standard, as many large rehabilitation projects take place over several years. A few commenters questioned whether the participating jurisdiction would be responsible for the cost to repair or replace a new system that originally met the useful life requirements if it fails sooner than the estimated timeframe of 15 years.

One commenter stated that the 5-year life expectancy requirement for homeownership housing would make it difficult for homebuyers to qualify their selected resale homes as eligible for HOME assistance. Some commenters stated that it is unfair to require a single-family rental house to have a 15-year useful life when a single-family homebuyer house is only required to have a 5-year useful life, and requested more flexibility with these requirements. Other commenter suggested a shorter useful life requirement of 5, 7, or 10 years for rental housing. A commenter recommended that the provision should state that all major systems must be in good operational condition rather than specifying time limits. A commenter supported the proposed capital needs assessment requirement for projects with 26 or more units. Another commenter recommended that a capital needs assessment be required for all rental projects, regardless of size. A few commenters recommended that HUD not impose a specific capital needs assessment format or process, and instead allow participating jurisdictions to use their own process. Another commenter requested clarification that a PJ is not required to conduct a capital needs assessment and it can be conducted by a professional third party entity.

HUD Response: HUD acknowledges the concerns that commenters expressed about the proposed language requiring that after rehabilitation all major systems must have a useful life of 15 years. HUD agrees with the commenters who stated that major systems with a significant remaining useful life should not be required to be replaced when the systems are in good condition and replacement is unnecessary. Consequently, for rental housing, the proposed requirement for a minimum 15-year useful life of major systems in § 92.251(b)(1)(ii) is removed in the final rule. Instead, as suggested by many commenters, the final rule states that for rental housing, the participating jurisdiction must estimate the remaining useful life of systems (based on age and current condition) and, to the extent that it is less than the period of affordability, the participating jurisdiction must ensure, through underwriting, that a replacement reserve is established and annual payments to the replacement reserve are adequate to replace or repair major systems as needed. HOME funds cannot be used to fund replacement reserves; however, larger HOME subsidies can be initially provided to reduce debt payments and overall operating expenses, making more operating revenue available to fund replacement reserves.

HUD is not imposing a specific format or process for the required capital needs assessment. Participating jurisdictions will have the flexibility to develop their own capital needs assessment format and process. However, the White House Domestic Policy Council's Rental Policy Working Group alignment initiative may recommend capital needs assessment requirements and/or guidance that may apply to all federally assisted and funded multifamily rental housing in the future. While the participating jurisdiction is ultimately responsible for the management and oversight of its HOME program to ensure compliance with the property standards requirements, a qualified third party can be procured to carry out these tasks. Therefore, the participating jurisdiction is not required to conduct the capital needs assessments, but it must review and approve any capital needs assessment conducted by a qualified third party. HUD has determined that the capital needs assessment requirement would be overly burdensome for multifamily projects with less than 26 units. HUD is adopting the proposed rule language without change.

For HOME-assisted homeowner housing (homebuyer acquisition and/or rehabilitation projects and rehabilitation of owner-occupied housing), HUD disagrees with the comment that the requirement for a minimum useful life of major systems would negatively impact local homeownership programs. The final rule does not change the proposed rule, and therefore states that each of the major systems must have a minimum useful life of 5 years, or the system(s) must be rehabilitated.

Disaster Mitigation

HUD proposed that, where applicable, housing would be required to be improved to mitigate the impact of disasters such as earthquakes, hurricanes, flooding, and fires.

Comments: Some commenters supported the language that allows construction of housing to mitigate the impact of potential disasters. A commenter requested guidance regarding how participating jurisdictions can meet the disaster mitigation requirements.

HUD Response: Where relevant, participating jurisdictions should consult applicable state and local codes, ordinances, and other requirements for guidance regarding how to construct housing to mitigate the impact of potential disasters. HUD is adopting the proposed rule language without change.

Discretionary Housing Improvements

HUD proposed adding a new paragraph, § 92.251(b)(2)(viii) to clarify that discretionary housing improvements beyond those required to meet property standards may include modest amenities and aesthetic features that are in keeping with housing of similar type in the community, and must avoid luxury improvements, as defined by the participating jurisdiction.

Comments: A few commenters opposed the prohibition against luxury improvements and the specific examples of luxury items provided in the preamble. Several commenters stated that what constitutes ''modest'' versus ''luxury'' may be subjective, and requested clarification regarding what is allowed or prohibited in HOME-assisted units and the level of discretion afforded to the participating jurisdiction. Other commenters suggested that cost effectiveness be considered when determining which materials, appliances, and fixtures are appropriate.

HUD Response: The commenters appeared not to understand that the proposed rule was not imposing new requirements. The requirement for non-luxury housing with suitable amenities, which applies to all HOME-assisted housing, is established in the existing regulation under ''eligible activities'' in

§ 92.205(a)(1). Because the non-luxury requirement is already established in § 92.205(a)(1), HUD has decided to remove the paragraph ''other improvements'' in proposed § 92.251(b)(2)(viii) at this final rule stage to avoid redundancy and clarify that new requirements are not being imposed.

Work Write-Ups, Construction Progress Inspections and Payment Schedules in New Construction and Rehabilitation Projects

HUD proposed to add new paragraphs to § 92.251(a)(2)(vi) and § 92.251(b)(3) and (4) to provide additional detail on required inspections and work write-ups. The proposed regulatory language was intended to make clear that a participating jurisdiction must inspect the property, and review and approve work write-ups for the project that describe the work needed to bring the project up to the participating jurisdiction's rehabilitation standards. The proposed language also provided that the participating jurisdiction must have written construction progress inspection procedures (including a description of how and by whom the inspections will be carried out) and detailed inspection checklists reflecting all aspects of the property standards, and that progress and final payments be tied to inspections of the completed work.

Comments: Some commenters expressed support for the requirement to establish progress payment schedules. Other commenters were concerned that the proposal would require additional expense and time (especially in rural areas); for example, requiring inspection before payments may delay disbursements until project completion and consequently increase interest costs for construction loans. The commenter stated that this, in turn, may prevent participating jurisdictions from investing in rural areas due to higher costs. They also expressed concern that the proposal would duplicate other inspections. Some commenters opposed these requirements and stated that construction progress inspections would significantly increase project costs and administrative burden, particularly for participating jurisdictions with limited staff. Other commenters said that participating jurisdiction staff may not be qualified or have the capacity to conduct the required inspections. Several commenters asked that HUD clarify that participating jurisdictions may enter into agreements that allow inspections to be done by a subrecipient or other qualified third party that is independent of the developer carrying out the activity. Some commenters suggested that the HOME regulations should allow independent architects under contract with developers to perform construction progress inspections and provide sign-off for payment disbursements to align with the LIHTC program and avoid redundancy. Other commenters suggested that participating jurisdictions should be permitted to rely on construction standards used and inspections performed by other governmental agencies (e.g., housing finance agencies) or private lenders, as long as they meet the HOME requirements. Another commenter requested that HUD provide a reasonable timeframe for completion of both the inspections and work write-ups to enable developers to include them in their construction schedules. Some commenters also requested training, technical assistance, and guidance materials to assist in implementing these provisions.

HUD Response: HUD appreciates the commenter's requests for clarification of these requirements. One of the primary purposes of proposing additional detail on required inspections and work write-ups was to ensure that participating jurisdictions are aware of the requirement to assess the work performed through periodic monitoring. While the participating jurisdiction is responsible for determining compliance with property standards requirements, it may hire a qualified third party inspector to carry out the tasks. For progress inspections, a participating jurisdiction can either use qualified in-house staff conduct inspections or hire or secure a qualified third party that is independent of the developer to conduct these inspections. For example, a participating jurisdiction may contract with an independent inspector, or in certain circumstances, use inspections conducted by other funders, such as investors or the bank, to satisfy these inspection requirements. Subrecipients can conduct the inspections, if specified in the written agreement with the participating jurisdiction, or it can hire an independent third party contractor to conduct the inspections. The participating jurisdiction cannot rely on or accept inspections and certifications performed by the developer or an agent or contractor of the developer. In response to the commenters' requests for clarification, the proposed regulatory language in § 92.251(a)(2)(vi), (a)(vii), and (b)(4) is revised in the final rule in a new paragraphs § 92.251(a)(2)(iv), (a)(2)(v) and (b)(2) and (b)(3) to clarify these requirements. HUD also plans to provide training and technical assistance to assist participating jurisdictions in implementing these provisions.

Regarding progress payment schedules, HUD agrees with the commenters that expressed concern about requiring progress inspections before payment may delay construction and potentially increasing costs. In many projects, HOME funds are used to acquire the site and construction is financed by other sources. Therefore, the proposed language may not effectively accomplish this purpose. At this final rule stage, HUD is revising § 92.251(a)(2)(vii) and (b)(4)(iii) to state that the participating jurisdiction must conduct periodic inspections during construction, see § 92.251(a)(2)(iv), (a)(2)(v) and (b)(2) and (b)(3) . These inspections do not need to be tied to the progress payments. Progress payments and inspections should be tied to the normal construction schedule; a separate payment schedule is not required for HOME.

Acquisition of Standard Housing

When HOME funds are used to purchase existing rental housing, such housing must be in good condition or it must be rehabilitated with HOME funds to ensure that the housing is in standard condition at the time of project completion. HUD proposed revising § 92.251(c)(1) to set forth property standards for existing housing in standard condition that is acquired with HOME funds. If the housing was newly constructed or rehabilitated less than one year before HOME funds were committed to acquire the housing as rental housing, the housing would be required to meet the property standards in § 92.251(a). The participating jurisdiction would be required to document this compliance based upon a review of approved building plans and Certificates of Occupancy, and a current inspection conducted no less than 30 days before the commitment of HOME assistance. Existing housing that did not meet these standards would be required to be rehabilitated.

In § 92.251(c)(2) HUD proposed that existing rental housing, which does not meet the definition of § 92.251(c)(1), is acquired with HOME funds would be required to be rehabilitated and meet the requirements of § 92.251(b). The participating jurisdiction would be required to document this compliance based upon a current inspection conducted no less than 30 days before the date of commitment of HOME assistance, in accordance with the inspection procedures that the participating jurisdiction established pursuant to this section.

Comments: A commenter stated that the requirements in § 92.251(c)(1) would impose an undue burden on properties that are in good condition. Some commenters asked HUD to reconsider the UPCS requirement for down payment assistance programs, stating that lenders already conduct inspections in accordance with local codes. A few commenters stated that the requirement to conduct a current inspection less than 30 days before the commitment of HOME assistance is not practical and does not allow sufficient time for financing issues and other required loan documentation. These commenters stated that by the time the participating jurisdiction obtains the inspection report, which is after the lender has approved the borrower's loan package, the proposed 30-day period may already have elapsed and another inspection may be required. A few commenters suggested that the requirement be changed to 120 days, as Federal Housing Administration (FHA) appraisals are valid within 120 days of the loan closing date. Another commenter recommended that the timeframe for inspections mirror the 90-day period for Uniform Residential Appraisal Report.

Several commenters expressed concern and opposition to the proposed required inspections for homebuyer housing. Some commenters expressed opposition to inspecting the unit after it is sold to the homebuyer, stating concern over cost and accessibility to the unit once it is sold. For homebuyer acquisition projects, one commenter recommended that, in addition to ensuring that the housing must be free from all health and safety defects before occupancy, the participating jurisdiction be required to ensure that all property standards are met before transfer of ownership and occupancy (instead of not later than 6 months after the transfer) to facilitate administration and ensure compliance.

HUD Response: HUD does not agree with commenters that stated that UPCS should not be applied to direct homebuyer assistance (e.g. downpayment assistance) because lenders already conduct inspections in accordance with local codes. While inspections for appraisal purposes are sometimes performed by lenders (e.g., for FHA-insured mortgages), there is no guarantee that these inspections, when performed, are always shared with homebuyers, or that these inspections contain details about the condition of the housing. Further, in many real estate transactions, the appraisal performed by the lender does not constitute an inspection and homebuyers are not required to obtain housing inspections. Low-income homebuyers who receive HOME downpayment assistance should be provided information that enables them to make informed decisions. Further, HUD must put rules in place that prevent the use of HOME funds for the purchase of substandard housing. Current regulations require that when HOME downpayment assistance is provided, the unit must meet applicable state and local codes, or in the absence of these codes, HQS. The final rule does not establish requirements significantly different from either the current regulation or the proposed rule.

The final rule states that existing housing that is acquired for homeownership (e.g., downpayment assistance) must be decent, safe, sanitary, and in good repair. The participating jurisdiction must establish standards to determine that the housing is decent, safe, sanitary, and in good repair. At minimum, the standards must provide that the housing meets all applicable State and local housing quality standards and code requirements and the housing does not contain the deficiencies proscribed by HUD based on the inspectable items and inspected areas in HUD-prescribed physical inspection procedures (UPCS) pursuant to 24 CFR 5.705.

HUD agrees that the requirement to conduct an inspection no less than 30 days before the commitment of HOME assistance may not allow sufficient time, resulting in duplicative inspections and unnecessary costs. Consequently, in the final rule at § 92.251(c)(1) and (c)(2), HUD is requiring that an inspection be conducted no less than 90 days before the commitment of HOME assistance. HUD acknowledges the concerns expressed about the proposed inspection required by the participating jurisdiction after a homeowner acquires a unit with HOME funds. In the final rule, to address public comment, HUD has revised the language to remove the requirement for the participating jurisdiction to inspect the unit after it is sold.

Informing homebuyers of any defects in the unit provides them with the opportunity to negotiate with the seller for repairs, or they can seek financial assistance for rehabilitation from the participating jurisdiction. If the housing does not meet these standards, the housing must be rehabilitated to meet the standards or it cannot be acquired with HOME funds.

Manufactured Housing

HUD proposed adding a requirement to § 92.251(e) that manufactured housing assisted with HOME funds must be attached to a permanent foundation.

Comments: A few commenters requested clarification regarding which definition and type of permanent foundation would be required. The commenters inquired about the foundation requirements in HUD Handbook 4930.3G [7] and CPD Notice 03–05 [8], as well as FHA Title II requirements for permanent foundations. Foundations for manufactured housing have major implications for the types of financing accessible to buyers and owners of manufactured homes. Some commenters expressed concern that this requirement may not be physically feasible for several existing manufactured housing sites or it would be very cost prohibitive if required as part of rehabilitation, and this could potentially exclude many units in need of rehabilitation from receiving HOME funds.

HUD Response: In the final rule, HUD is requiring permanent foundations for the new construction and replacement of manufactured housing units under § 92.251(e). HUD clarifies that the definition of ''permanent foundation'' means a foundation system of supports that is capable of transferring all design loads to the ground and meets the requirements of 24 CFR 203.43f(c)(i). This definition is consistent with the FHA mortgage insurance requirements for all manufactured homes, which must be constructed in conformance with the Federal Manufactured Home and Safety Standards, as evidenced by an affixed certification label in accordance with 24 CFR 3280.11. Accordingly, what determines whether a foundation is permanent is HUD's Permanent Foundation Guide for Manufactured Housing, (HUD Publication 7584). To address commenters' concerns that it may not be possible to secure some existing manufactured housing to a permanent foundation, HUD is clarifying that foundation systems for existing units must be inspected and meet the applicable state or local codes, subject to the approval of the participating jurisdiction's building officials. In the absence of local or state codes, the participating jurisdiction must use the Model Manufactured Home Installation Standards at 24 CFR part 3285.

[7] See *http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/guidebooks/4930.3G.*

[8] See *http://www.hud.gov/offices/cpd/lawsregs/notices/2003/03-05.pdf.*

Ongoing Property Condition Standards During Period of Affordability

HUD proposed to eliminate the requirement that HOME-assisted rental housing meet the housing quality standards (HQS) in 24 CFR 982.401 applicable during the period of affordability and instead adopt UPCS as the minimum habitability standard, in concert with applicable state and local code requirements. HUD proposed that at a minimum, the participating jurisdiction's ongoing property standards would be required to include all inspectable items in the most recent notice setting forth the physical inspection procedures prescribed by HUD, pursuant to 24 CFR 5.705.

Comments: A few commenters supported the requirement that the housing must meet all applicable state and local code requirements and ordinances, but suggested that HUD not require participating jurisdictions to inspect or enforce those local standards. These commenters also recommended that the Minimum Property Standards (MPS) in 24 CFR 200.925 or 200.926 remain as an alternative standard for compliance when viable. Other commenters suggested that participating jurisdictions should be allowed to rely on the findings of other agencies and organizations that conduct ongoing inspections to minimize administrative burden and improve efficiency. A commenter requested guidance to assist in implementing these standards.

HUD Response: While the participating jurisdiction is responsible for ensuring compliance with the ongoing property standards requirements, it may contract with a qualified third party to perform these tasks. A participating jurisdiction can use qualified in-house staff conduct inspections or execute a contract with a qualified third party (as a contractor of the participating jurisdiction) that is independent of the project owner to conduct inspections.

Subrecipients can conduct these inspections if it is specified in their written agreement with the participating jurisdiction or it can hire an independent, third-party contractor to do the inspections. Although the participating jurisdiction staff is not required to conduct the inspections, the participating jurisdiction cannot rely on or accept independent inspections performed by any party not under contract to the participating jurisdiction or its subrecipient, including inspections and certifications by the project owner or a contractor of the project owner. Participating jurisdictions or its subrecipients cannot rely on any inspections performed by any party that is not contractually obligated to perform the participating jurisdiction's obligations to determine compliance with HOME property standards requirements. If the participating jurisdiction uses a state recipient, subrecipient, or contractor to perform these inspections, it must assess the work performed through periodic monitoring.

HUD finds that the UPCS is a more suitable inspection protocol for HOME-assisted housing than the MPS. As discussed above, the adoption of UPCS in the HOME program could facilitate alignment between HOME and other Federal affordable housing programs. When administrative alignment regarding the use of UPCS across federal affordable housing programs is completed, participating jurisdictions and their subrecipients may choose to cooperate with other federal funders in a jointly funded project to share inspection data, and may use inspections conducted by these funders if they willing to accept the data. This could result in decreased administrative burden and cost. HUD will issue guidance or modify these regulations at the appropriate time to facilitate alignment.

In the final rule, the language has been revised to remove UPCS as a minimum requirement for the participating jurisdiction's ongoing property standards. HUD has determined that this requirement may result in duplicative inspections and could result in HOME-assisted rental units being inspected in accordance with both UPCS and state or local codes by different inspectors. The HOME statute requires that all HOME units must be inspected and meet applicable state and local codes. In many places it may be administratively burdensome or impracticable to try to combine or compare state or local codes with UPCS. Therefore, participating jurisdictions will use UPCS for property inspections of HOME-assisted rental housing only in the absence of applicable state or local codes. HUD plans to issue guidance to establish which inspectable items and areas must be included in the participating jurisdiction's ongoing property standards and which critical deficiencies must be corrected. The participating jurisdiction's property standards are not required to use any scoring, item weight, or level of criticality in the UPCS.

HUD has added language to the final regulation at § 92.251(f)(2) clarifying that the ongoing property standards for existing HOME rental projects and for rental projects to which funds are committed before the effective date of the new ongoing property standards must continue to meet the standards in effect at the time HOME funds were committed.

o. Qualification as Affordable Housing: Rental Housing (§ 92.252)

Initial Occupancy of HOME-Assisted Units

HUD proposed revising § 92.252 to require that HOME-assisted rental units be occupied by an initial tenant within a specified period from the date of project completion. While the regulation itself did not include a timeframe, the preamble specifically solicited comments on the appropriate timeframe, which would not be less than 3 months or longer than 6 months. If units have not been leased to an eligible tenant within that time, HUD will require the participating jurisdiction to provide information about current marketing efforts and, if appropriate, a plan for marketing the unit so that it is leased as quickly as possible. If a unit is not occupied by an initial tenant after 18 months, HUD would require repayment of HOME funds invested in the units.

Comments: Several commenters stated that 18 months was a reasonable timeframe to expect HOME-assisted units to achieve initial occupancy. Of these commenters, some suggested that extensions be permitted or a formal appeals process be established. Other commenters opposed the proposed provision in § 92.252 that would require HOME funds invested in a unit that has not had an initial occupant within 18 months to be repaid to by the participating jurisdiction to its HOME account. HUD received many comments regarding the point at which a vacant unit should trigger HUD review of the marketing plan or a requirement for enhanced marketing efforts. HUD received no comments supporting a 3-month period to achieve initial occupancy and few comments in support of a 6-month period. Several commenters recommended a 9- or 12-month timeframe for achieving initial occupancy. Some commenters cited weak market conditions in some areas, or the administrative burden of overseeing enhanced marketing on participating jurisdictions as justification for a longer period to achieve occupancy before enhanced marketing requirements are triggered. One national organization that works exclusively in rural areas commented that projects in rural areas routinely take longer than 6 months to rent up.

HUD Response: HUD agrees with commenters that for many projects it will take longer than 3 months to achieve initial occupancy of all HOME-assisted units, even when acceptable marketing. However, HUD remains concerned that a unit that is still vacant at 6 months may be the result of inadequate marketing or market demand, and that intervention to improve the marketing of the unit is needed at that point.

A unit that has not served a low- or very low-income household has never met the purposes of the HOME program and therefore, the costs associated with the unit are ineligible. HUD therefore maintains that 18 months is a more than adequate amount of time for a HOME-funded unit to be rented to an initial occupant, if the market demand for the project was adequate at the time funds were committed to it. The requirement that HOME funds expended on a unit that is never rented to an income-eligible household would have to be repaid provides participating jurisdictions further incentive to select projects for which there is adequate market demand for the affordable units. HUD is adopting the proposed provision of § 92.252 without change. Projects that encounter extraordinary circumstances can be dealt with administratively.

Requirement for Leases

HUD proposed adding a sentence to the introductory paragraph of § 92.252 to make explicit that leases are required for all HOME-assisted rental units.

Comments: Only a few commenters commented on this provision, but they were all supportive of the change. One of the commenters recommended that HUD explicitly make permissible ''master leases'' signed by organizations that rent individual units to clients.

HUD Response: HUD is adopting the proposed rule language without change. NAHA requires that HOME rental units be rented to low- or very low-income families. Leasing of HOME units by organizations that rent to individuals is not permissible.

High HOME Rent and Low HOME Rent Terminology

HUD proposed to incorporate the ''High HOME rent'' (i.e., ''maximum HOME rent'') and ''Low HOME rent'' (i.e., ''additional requirements'') terminology, which is commonly used by HUD, participating jurisdictions, and other HOME program participants, including owners, developers, and property managers, into paragraphs (a) and (b) for clarity. No comments were received on this change, and HUD is adopting the proposed language without change.

Inclusion of Utilities and Utility Allowances in HOME Rent Limits

HUD proposed a revision to § 92.252(a) to specifically state that HOME rent limits include both rent and utilities or utility allowance. No comments were received on this change, and the proposed rule language is adopted without change.

Low HOME Rent Units Receiving Project-Based Rental Assistance

HUD proposed a change to paragraph (b)(2) to make clear that participating jurisdictions may designate more than the minimum 20 percent of units in a project as Low HOME rent units, as is common practice in many HOME projects, particularly in projects that also receive project-based rental assistance. This practice facilitates the use of HOME funds for extremely low-income households, such as Section 202 projects for the elderly or permanent supportive housing for the homeless.

Comments: A few commenters expressed concern that, by limiting the applicability of the project-based assistance rents to Low HOME rent units (which must be occupied by households with incomes at or below 50 percent of area median income), HUD is limiting the benefit of this provision.

HUD Response: The HOME rent limitations, including required occupancy of Low HOME rent units by very low-income households, are statutory. HUD does not have the discretion to extend the Low HOME rent provisions to units occupied by households with incomes above 50 percent of area median income. The proposed rule language is adopted without change.

Single Room Occupancy Unit Rents

HUD proposed adding language to § 92.252(c) to establish the applicable rent limits for Single Room Occupancy (SRO) units assisted with HOME. Recognizing that a zero-bedroom rent was not appropriate for all SROs, depending on the amenities located within the unit, HUD established these rent limitations in administrative guidance in 1994. HUD did not receive comments on this provision, and is adopting the proposed rule language except that a circular reference to fair market rents is corrected in both subparagraphs (c)(1) and (c)(2). The reference should be to maximum HOME rent.

Utility Allowances

HUD proposed adding language to § 92.252(d) to require participating jurisdictions to use the HUD Utility Schedule Model to determine a project's annual utility allowance or to otherwise determine a project's utility allowance based upon the utilities used at the project. The model was developed by HUD and enables the user to calculate utility schedules by housing type after inputting utility rate information. The IRS uses this model to determine utilities for its LIHTC program. The model can be found at: *http://huduser.org/portal/resources/utilmodel.html.*

Comments: A few commenters opposed the adoption of the Utility Schedule Model, stating that it is more complicated to determine a utility allowance for each project as opposed to relying on the local Public Housing Agency's (PHA) utility allowance. One of the commenters asked whether participating jurisdictions would be able to continue using the PHA utility allowance under the proposed regulatory language.

HUD Response: Under the proposed rule language, a participating jurisdiction would be required to determine an individual utility allowance for each HOME rental project, either by using the model or by otherwise determining the allowance based upon the specific utilities used at the project. Participating jurisdictions would no longer be permitted to use the utility allowance established by the local PHA for every HOME-assisted rental project. Application of these standardized utility allowances may result in undercharging or overcharging of rent, particularly in projects where tenants pay utilities directly. As more projects are constructed or rehabilitated to higher energy-efficiency standards, thus enhancing affordability of the units, the use of a standard utility allowance that may not represent actual utility costs is difficult to justify. The availability of the HUD Utility Schedule Model minimizes any burden associated with determining utility allowance for each project. HUD is adopting the proposed rule language without change.

Requirement To Repay When Affordability Restrictions Are Terminated During the Affordability Period

HUD proposed adding a sentence to § 92.252(e) to clarify existing regulatory requirements by specifically stating that the termination of affordability restrictions under paragraph (e) does not relieve a participating jurisdiction of its repayment obligation for housing that did not remain affordable for the required period under § 92.503(b). To increase local administrative flexibility, HUD also proposed specifically authorizing use agreements to impose affordability restrictions, in addition to those currently included in the regulations (i.e., deed restrictions and covenants running with the land). HUD also proposed adding language to clarify that HOME affordability restrictions must be recorded in accordance with state recordation laws.

Comments: A few commenters stated that participating jurisdictions should only be required to repay the prorata share of the HOME investment in a foreclosed project attributable to the proportion of the affordability period that was not met. Another commenter suggested that participating jurisdictions should only be required to repay to its HOME account funds that the participating jurisdiction is able to recover through the foreclosure. Other commenters stated that they record enforcement mechanisms other than deed restrictions, land covenants or use restrictions to impose HOME requirements on project deeds.

HUD Response: HUD does not agree that participating jurisdictions should only be required to repay a prorata share of the HOME investment in a project that does not meet affordability requirements for the required period or that they should only be required to repay what they can obtain at foreclosure. Adopting the former approach would provide an incentive for owners or participating jurisdictions to repay HOME funds to terminate restrictions and potentially convert housing to market rate. Under the latter approach, a participating jurisdiction with a troubled HOME project would lack a financial incentive to pursue a financial or physical workout of the project. In response to comments regarding the mechanisms that participating jurisdictions employ to impose HOME requirements, HUD is revising this paragraph to eliminate the term ''use agreements'' and instead state that there must an agreement restricting the use of the property that gives the participating jurisdiction the right to require specific performance.

Review and Approval of Rents Charged in HOME Units

HUD proposed adding a sentence to § 92.252(f)(2) to require that a participating jurisdiction must review and approve the rents for its HOME-assisted rental projects each year to ensure that they comply with the HOME limits and do not result in undue increases from the previous year. Participating jurisdictions are currently required to provide the published maximum HOME rents to project owners and then to examine reports submitted by owners outlining for each HOME unit the rent being charged and the income of the tenant. The additional step codifies existing practice of most participating jurisdictions, which do not permit HOME project owners to raise rents without approval or to charge the maximum permissible HOME rent.

Comments: A few commenters, all members of the same HOME consortium, expressed concern about the administrative burden of reviewing and approving rents. A commenter requested that HUD provide guidance on how to implement an efficient rent approval process. Another commenter questioned the legal basis for participating jurisdictions to approve the amount of rent increases as long as rents remain at or below the HOME maximum rent limits.

HUD Response: While upfront review and approval of rents may create a modest additional burden for participating jurisdictions that are not currently engaging in the practice, HUD maintains that adopting this practice, which is already widely in use among participating jurisdictions, will reduce the much greater burden associated with bringing rental projects with noncompliant rents into compliance with HOME affordability requirements. Further, participating jurisdictions that underwrite projects with long-term sustainability as a goal rarely permit a project to charge maximum HOME rents to ensure that future viability of the project is not endangered by minimal rent increases or even decreases in the applicable HOME rents. These participating jurisdictions generally include upfront approval of rent increases in their HOME written agreements. HUD is adopting the proposed rule language without change.

Fixed and Floating HOME Rental Units

HUD proposed adding language to § 92.252(j) to specify that the written agreement between the participating jurisdiction and a project owner must state whether HOME rental units will be fixed or floating during the period of affordability because participating jurisdictions are not always documenting the determination or including the specific designation in their written agreements.

Comments: A commenter stated that HUD should permit a project's unit designation as fixed or floating to be changed during the period of affordability. Another commenter asked how a participating jurisdiction could designate units in a project with floating units as HOME units at the time of commitment, since units would not yet be occupied.

HUD Response: The decision regarding whether HOME units will be fixed during the period of affordability or will be permitted to float is nearly always determined by whether or not the units in a project are comparable in terms of mix of bedroom sizes, square footage, and level of amenities. Consequently, there are few projects that can change from a fixed to a floating designation during the period of affordability. For this reason, HUD is not adopting this suggestion. To clarify, the participating jurisdiction must determine whether the units in a project will be fixed or floating at the time of commitment of the HOME funds because that decision affects the amount of HOME funding the project can receive. Depending on the mix of unit sizes in a project, HOME units may not be permitted to float. The fixed versus floating determination dictates the income targeting requirements applicable to each HOME unit, HUD is adopting the proposed rule language. However, it is revising the language slightly to clarify that the written agreement must require the project owner to provide the participating jurisdiction with the address and unit number of each HOME-assisted unit no later than initial occupancy rather at project completion.

Cross-References for User Convenience

HUD proposed adding two new paragraphs to § 92.252 to make the regulations more user-friendly for persons attempting to locate requirements related to rental housing. No comments were received on this change and HUD is adopting the proposed rule language without change. A new § 92.252(k) that cross-references the tenant selection requirements located in § 92.253(d) is added. A new paragraph (l) is added to § 92.252 that cross-references participating jurisdictions' ongoing responsibilities for on-site inspections, and financial oversight located in § 92.504(d).

p. Tenant Protections and Selection (§ 92.253)

Required Leases in HOME Rental and Tenant-Based Rental Assistance Units

HUD proposed revising § 92.253(a) to clarify that there must be a written lease for all HOME-assisted rental units and units rented by HOME tenant-based rental assistance recipients, and that the statutory tenant protections in this paragraph must be integrated into the lease. HUD received no comments on the proposed clarification, and the proposed rule language is adopted without change.

Mandatory Supportive Services

HUD proposed adding a new paragraph § 92.253(b)(9) prohibiting lease terms that make acceptance of supportive services mandatory, except that a tenant in transitional housing may be required to accept supportive services. This clarification is consistent with section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of disability in Federally-funded programs and activities and HUD's implementing regulations at 24 CFR part 8. HUD did not receive comments on the provision in this paragraph. HUD received comments on the related provision in § 92.253(c), which are addressed below. HUD is adopting this proposed rule provision without change.

Termination of Tenancy Through Eviction or Refusal To Renew a Lease

HUD proposed revising § 92.253(c) to provide that a tenant's failure to follow a transitional housing services plan is a permissible basis for terminating a tenancy or refusing to renew a lease, to ensure the unit can be made available to individuals who use the transitional housing for its intended purpose. HUD also proposed revising § 92.253(c) to make explicit that an increase in a tenant's income does not constitute good cause for termination or refusal to renew.

Comments: HUD received several comments supporting the addition of the provision making failure to follow a transitional housing services plan a basis for evicting or refusing to renew the lease of a tenant of a transitional housing project. A few commenters requested that HUD clarify whether supportive services are the same as a transitional housing services plan.

Several commenters objected to the requirement that owners of HOME rental housing provide 30-day written notice before evicting a tenant or refusing to renew a lease. Commenters stated that it is necessary for project owners to have the ability to remove tenants who pose an imminent threat to residents or employees of the project or to the property.

HUD Response: HUD agrees that the use of the term ''transitional housing services plan'' may lead to confusion, since not all transitional housing providers establish such plans. Consequently, at this final rule stage, HUD is revising the rule language to eliminate the term and to make clear that failure to participate in any required supportive services is a basis for terminating tenancy of a transitional housing resident.

The 30-day written notice requirement for eviction or refusal to renew a lease is not new. It is a longstanding provision of the HOME regulations that implements a statutory requirement that 30-day written notice be provided in these cases. HUD is adopting the proposed rule language without change.

Nondiscrimination Against Rental Assistance Subsidy Holders

HUD proposed moving the provisions on nondiscrimination against rental assistance subsidy holders in existing § 92.252(d) to § 92.253(d)(4). No substantive change was proposed.

Comments: A few commenters suggested that HUD expand the prohibition on discrimination against voucher holders to include policies and criteria that have the effect of excluding families with vouchers or HOME tenant-based rental assistance.

HUD Response: The existing rule language reflects the provisions of section 215(a)(1)(D) of NAHA. HUD finds that this language adequately implements the statutory intent. The provision is being moved to § 92.253(d)(4) as proposed, without change.

Preferences for Persons With Disabilities

HUD proposed adding language at new § 92.253(d)(3)(i) that would provide that any limitation or preference for HOME-assisted housing must not violate nondiscrimination requirements listed in § 92.350, and clarify that a limitation or preference does not violate nondiscrimination requirements if the housing also receives funding from a Federal program that limits eligibility to a particular segment of the population (e.g., HUD's Section 202 supportive housing for the elderly, Section 811 housing for persons with disabilities, etc.). HUD also proposed a new § 92.253(d)(3)(ii) that would provide that preferences may be given to disabled families who need services offered at a project, if certain conditions are met.

Comments: A commenter supported the change as written in the proposed rule. Other commenters drafted and submitted substitute language addressing permanent supportive housing, manufactured housing, and housing receiving LIHTC. A commenter submitted revised regulatory language addressing what was believed to be technical and interpretative issues.

HUD Response: HUD's proposed language is compliant with applicable civil rights laws and regulations, including Section 504 of the Rehabilitation Act of 1973 and implementing regulations at 24 CFR part 8. Additionally, the proposed rule language does not present problems for the particular permanent supportive housing model favored by several commenters, which was their primary concern. In fact, adopting the suggested language would limit flexibility to use other models of permanent supportive housing. Consequently, HUD declines to adopt any of the alternative language offered by commenters and is adopting the proposed rule language without change.

q. Qualification as Affordable Housing: Homeownership (§ 92.254)

95 Percent of Area Median Purchase Price Limitation on Sales Price and After-Rehabilitation Value

HUD proposed revising § 92.254(a)(2)(iii) so that participating jurisdictions would no longer be permitted to use the FHA Single Family Mortgage Limit (known as the 203(b) limit) as a surrogate for 95 percent of area median purchase price. Section 215(b) of NAHA requires that the initial purchase price of homeownership units assisted with HOME funds not exceed 95 percent of the area median purchase price for single family housing, as determined by HUD. The preamble to the proposed rule describes in detail why continuing to use the 203(b) limit as the sales price or after-rehabilitation value limit for HOME homeownership projects would violate NAHA. HUD proposed calculating 95 percent of median purchase price for each MSA or county and providing the limits annually, as it has been doing for informational purposes since 2008. In response to participating jurisdictions' concerns regarding the very low median sales prices in some non-metropolitan areas, HUD proposed amending § 92.254(a)(2)(iii) to permit participating jurisdictions to use the greater of the HUD-issued 95 percent of area median purchase price limit or 95 percent of the Bureau of the Census' median sales price for single family houses sold outside of MSAs.

Comments: Many commenters opposed elimination of the 203(b) limit, which currently has a floor of $200,170, as the sales price or after-rehabilitation value limit for HOME-assisted homeownership units. Several of these commenters suggested that HUD adopt 95 percent of the national median sales price as the HOME homeownership limit. A commenter recommended that HUD permit each State participating jurisdiction to use 95 percent of its statewide median sales price as its HOME limit. Another commenter suggested that HUD adopt a phased approach to implementing the new limits. Several commenters approved HUD's proposal to permit participating jurisdictions to use the greater of its HUD-calculated 95 percent of area median purchase price or the Census Bureau's median sales price for single family houses sold outside of MSAs as the HOME homeownership limit for new construction units. Other commenters expressed concern that the requirement that the after-rehabilitation value of homeownership units rehabilitated for sale or for existing low-income owner-occupants not exceed the HUD-calculated 95 percent limits would all but eliminate many participating jurisdictions' ability to use HOME funds for such purposes. These commenters stated that eliminating or limiting the use of HOME funds for rehabilitation of existing housing would have a detrimental effect on low-income seniors and on neighborhood revitalization efforts. Some of these commenters recommended that HUD establish a minimum limit for existing housing acquired or rehabilitated with HOME funds, similar to the Census Bureau figure proposed for newly constructed homeownership units.

HUD Response: HUD agrees that limiting the use of HOME funds for rehabilitation in areas with low median sales prices and/or dilapidated housing stock may be an unintended consequence of the NAHA provision, the purpose of which is to ensure that HOME funds are used only for modest housing. However, HUD is statutorily prohibited from retaining the 203(b) limit as the 95 percent of area median purchase price for an area. Consequently, HUD is eliminating the 203(b) limit as the sales price or after-rehabilitation value limit for HOME-assisted homeownership housing in this final rule.

HUD has carefully considered how to address commenters' concern about the effect that low median sales prices in some areas will have on the HOME program while still complying with the NAHA provisions. HUD has determined that the use of an alternate data set that excludes housing that is not in standard physical condition is consistent with the statutory intent and yields 95 percent of area median sales figures that more accurately reflect the market value of newly constructed and standard existing housing. For newly constructed single family housing units being developed or acquired with HOME funds, HUD will provide limits for affordable newly constructed housing based on 95 percent of the median purchase price of newly constructed housing in the area using data from the Federal Housing Administration (FHA) and other appropriate data sources, with a minimum limit based on 95 percent of the U.S. median purchase price for new construction for nonmetropolitan areas. For existing single family housing units being acquired and/or rehabilitated with HOME funds, HUD will provide limits for affordable existing housing based on 95 percent of the median purchase price of existing housing in the area using data from the FHA and other appropriate data sources on sale prices of existing homes in standard condition, with a minimum limit based on 95 percent of the state-wide nonmetropolitan area median purchase price using this data. Participating jurisdictions also would continue to have the option to determine their own 95 percent of area median value limit using the methodology in the regulation, which remains unchanged. HUD is amending § 92.254(a)(2)(iii) of the regulation to establish these affordable housing value limits.

Conversion of Unsold Homeownership Units to Rental Housing

HUD proposed revising § 92.254(a)(3) to require participating jurisdictions to convert homebuyer housing that has not been sold to an eligible homebuyer within 6 months of the completion of construction or rehabilitation to rental housing that complies with all provisions of § 92.252. If an unsold homebuyer unit is not converted to rental housing, the participating jurisdiction would be required to repay the HOME funds expended on it.

Comments: HUD received many comments opposing adoption of this proposed provision. The commenters stated that the provision would discourage the use of HOME funds for development of homebuyer housing, because both developers and construction lenders would be unwilling to risk participating in projects that might be required to change tenure type after construction. Commenters were also concerned about finding permanent financing to repay private construction loans, since there would be no sales proceeds to retire construction debt. Other commenters were concerned that homeowner association rules might prohibit a conversion to rental housing; one commenter asked that HUD specifically exclude HOME-funded condominium units for this reason. Many commenters stated that the 6-month deadline was arbitrary or unrealistic given current market conditions. Some commenters recommended that HUD extend the period for sale of homebuyer units to periods ranging from 9 to 24 months before requiring conversion. Several commenters requested that HUD permit unsold homebuyer units to be placed into service as lease-purchase units. Many commenters pointed out that the developers that build homeownership units often do not have the capacity to function as owners/property managers of rental units. Other commenters requested that units converted to rental be permitted to convert back to homeownership at any time.

HUD Response: HUD recognizes that commenters raised valid concerns regarding this provision. HUD shares the commenters' concerns about the availability of permanent financing and the challenge of finding an alternate owner for a homebuyer unit being converted to a HOME rental unit. HUD is also aware that some participating jurisdictions continue to award HOME funds for additional homebuyer units, despite large inventories of foreclosed properties, a lack of current market demand for homebuyer units, and/or inability of the target population to access first mortgage financing necessary to purchased HOME-assisted units. Congress demonstrated that it shares HUD's concern by including a 6-month deadline for selling homebuyer units funded with FY 2012 and FY 2013 HOME funds. Clearly, participating jurisdictions that wish to use HOME funds for development of additional homebuyer units must carefully consider projected demand for the units and the availability of private mortgage financing for low-income homebuyers. They must create and maintain their own list of potential low-income homebuyers, rely less on developers to identify homebuyers, and pre-identify specific homebuyers for units to the extent possible.

In response to the concerns raised, HUD has determined that it is appropriate to extend the timeframe for selling homebuyer units to 9 months from the completion of construction. In addition, to alleviate potential noncompliance due to common delays in closings, HUD is specifying that a ratified contract for purchase of a HOME-assisted unit is sufficient to meet the deadline for sale of the unit. This extension balances, to some extent, the interest in ensuring that federal funds timely result in public benefit. Because this final rule applies to projects to which HOME funds are committed on or after the effective date, this provision will not affect units that are already built or under construction. HOME homebuyer projects funded with FY 2012 and FY 2013 HOME funds will be subject to the provisions of Public Law 112–55, *Consolidated and Further Continuing Appropriations Act, 2012,* which established a 6-month period for selling HOME homebuyer units or converting them to rental. Before committing HOME funds to a homebuyer project, participating jurisdictions must carefully consider how they would address issues of ownership, management, and financing should they be required to convert an unsold homebuyer unit to a rental unit. HUD is not adopting the recommendation to permit unsold homebuyer units to be converted to lease-purchase units. Lease-purchase arrangements can work very well when administered through a well-designed lease-purchase program that includes strong management and tenant supports and counseling. If a participating jurisdiction has such a program, it can identify a lease-purchase candidate and place an unsold unit into this program before 9 months has elapsed. If a tenant wishes to purchase a unit that has been converted from a homebuyer activity to a rental activity, this is allowable under 24 CFR 92.255 of the existing regulations.

Income of All Persons Residing in the Housing

HUD proposed revising §§ 92.254(a)(3) and 92.254(b)(2) to specify that the income of all adults residing in the housing must be included when determining the income of a family applying for homebuyer or homeowner rehabilitation assistance. No opposition was expressed for this proposal and a commenter voiced support for this proposed change. HUD is adopting the proposed rule provision in the final rule.

Housing Counseling

HUD proposed revisions to § 92.254(a)(3) to require that all homebuyers receiving HOME assistance or purchasing units developed with HOME funds receive housing counseling.

Comments: HUD received several comments related to the proposed housing counseling requirement. A commenter opposed requiring that HOME-assisted homebuyers receive housing counseling. Several commenters expressed support for the requirement, citing the value of housing counseling in preparing families for homeownership. However, some commenters expressed concern about the cost of compliance, given that counseling provided to individuals who do not complete a HOME-assisted purchase can only be charged as HOME administrative costs. A few commenters presented alternative approaches to addressing the possible financial burden, including establishing housing counseling eligible as a stand alone activity under which participating jurisdictions could run HOME-funded housing counseling programs. Many commenters assumed that potential homebuyers could not be charged a fee for homebuyer counseling and objected to the perceived prohibition.

HUD Response: Because the HOME statute clearly specifies that there are four eligible activities, HUD cannot administratively establish additional eligible activities. For this reason, it is not possible to establish freestanding housing counseling programs as eligible for HOME funds. Housing counseling provided to an individual or family can be charged as a project-related soft cost under § 92.205(d) or as an administrative cost under § 92.207(b). Contrary to the understanding of several commenters, HUD does not currently prohibit potential HOME homebuyers from paying a fee to cover the cost of housing counseling and did not contemplate creating such a prohibition in the proposed rule. HUD is adding language to §§ 92.206(d)(6), 92.207(b) and 92.214(b)(1)(iii) to make clear that homebuyers may be charged reasonable fees to cover the cost of housing counseling. HUD is adopting the provision requiring housing counseling for homebuyers as published in the proposed rule.

Approval of Resale and Recapture Provisions

HUD proposed revising § 92.254(a)(5) to require participating jurisdictions to obtain HUD's specific written approval of their resale and recapture provisions.

Comments: Several commenters expressed concern that HUD does not have adequate staff to timely review and approve the number of resale and recapture provisions that would be submitted for review and approval. Specifically, commenters stated that limited HUD staffing and the potential for a short approval timeframe would delay approval of resale and recapture provisions. Several commenters stated that HUD could simplify the approval process by either providing standard resale and recapture language, thereby eliminating the need for HUD approval, or by maintaining the current process of approving the provisions in each participating jurisdiction's annual action plan.

HUD Response: Currently participating jurisdictions are required to describe their resale and recapture provisions in their annual action plans they submit to HUD for review and approval. HUD's approval of an annual action plan provided implicit approval of the resale and recapture provisions contained in the plan. HUD did not propose a significant change to this process. Participating jurisdictions will still submit resale and recapture provisions in the consolidated or annual action plans, unless they have a need to submit new provisions at some other point in the year. The change is that HUD must specifically provide notification that the provisions have been approved or disapproved. HUD does not view this as a significant additional burden on HUD staff and is not concerned that this change would affect the timeliness of approvals. Consequently, HUD is adopting the proposed rule language without change.

Fair Return and Affordability to a Reasonable Range of Low-Income Homebuyers

HUD proposed amending § 92.254(a)(5)(i) to require participating jurisdictions, in their resale provisions, to specifically define "fair return on investment" and "affordability to a reasonable range of low-income buyers," and to address how it will make the housing affordable if the resale price that is needed for a fair return on investment is too high to be within the affordable range.

Comments: HUD received a few comments related to defining fair return on investment and affordable to a reasonable range of low-income homebuyers. The commenters stated that HUD should not adopt the language as proposed, instead requesting that HUD permit participating jurisdictions the flexibility to determine fair return and affordability based on market conditions at the time of sale. The commenters also stated that HUD should clearly define these terms for participating jurisdictions to ensure clarity and accuracy.

HUD Response: HUD has found that many resale provisions are not clearly described and do not meet statutory and regulatory requirements. Requiring participating jurisdictions to clearly define these terms is expected to encourage participating jurisdictions to improve their ability to design resale requirements that are understandable to potential homebuyers and reflect the local housing market. Further, resale provisions are required to be imposed at the time that the HOME-assisted purchase takes place. Participating jurisdictions are not permitted to decide what constitutes fair return or affordability to a reasonable range of low-income homebuyers at the time that the HOME-assisted unit is resold. HUD is adopting the proposed rule language without change.

Assumption of Recapture Obligations by Subsequent Homebuyer

HUD proposed amending § 92.254(a)(5)(ii) to permit a subsequent low-income purchaser of a HOME-assisted homeownership unit to assume the HOME loan and recapture obligation entered into by the original buyer.

Comments: Several commenters supported the proposed provision permitting a subsequent income-eligible homebuyer to assume existing loan and affordability restrictions under a recapture provision, agreeing that it would promote administrative simplicity for participating jurisdictions and assisted homebuyers.

HUD Response: HUD is adopting the provision, but has added a clarification that the subsequent, eligible homebuyer can only assume the existing loan and affordability obligations if no additional HOME assistance is provided to the subsequent homebuyer. In cases in which the subsequent homebuyer needs HOME assistance in excess of the balance of the original HOME loan, the HOME subsidy (the direct subsidy as described in § 92.254) to the original homebuyer would be recaptured and separate HOME subsidy would be provided to the new homebuyer.

Exceptions to Qualification as Homeowner

HUD proposed amending § 92.254(c) to permit rehabilitation assistance to be provided in three types of situations—heir properties, life estates, and living trusts—under which the occupant of the housing would not meet the definition of ''homeownership'' in § 92.2.

Comments: Two commenters urged HUD to include beneficiary deeds, under which a property passes, subject to all conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges and other encumbrances made by the owners during the owner's lifetime, directly to a grantee beneficiary upon the death of the owner, as an eligible form of homeownership.

HUD Response: HUD agrees that beneficiary deeds, which are used in a number of states, should qualify as a form of homeownership for purposes of owner-occupied rehabilitation projects. HUD has revised this final rule to permit owners that have beneficiary deeds to qualify for HOME rehabilitation assistance, if the owner is low-income at the time assistance is provided.

Oversight of Certain Subrecipients and Contractors

HUD proposed adding a new § 92.254(e) that would put in place safeguards to prevent potential abuses in situations in which the same entity is under contract with the participating jurisdiction to provide HOME homeownership assistance (e.g., downpayment assistance) and is also providing first mortgage financing to the same families.

Comments: A commenter opposed requiring participating jurisdictions to verify income eligibility and inspect units in situations in which subrecipients or contractors are providing both the first mortgage and HOME downpayment assistance because it was overly burdensome. A few commenters sought clarification of whether the provisions would apply this requirement to primary lenders that perform HOME administrative functions (e.g., income determinations) related to qualifying applicants for HOME assistance, but do not originate HOME loans to homebuyers.

HUD Response: The proposed rule limits this provision to situations in which a contractor or subrecipient acts as a private mortgage lender and as the originator of HOME loans. However, at this final rule stage, HUD extends these provisions to situations in which a primary lender also acts as a subrecipient or contractor qualifying a household or housing unit for HOME assistance. It is in the public interest to provide this extension because these organizations earn fees for originating non-HOME mortgages to borrowers also receiving HOME funds. Participating jurisdictions that find this additional oversight burdensome should avoid entering into contractual agreements that may result in financial incentives to approve HOME assistance. HUD is adopting the proposed provision and extending it to cover the situations described above.

Underwriting, Responsible Lending, and Refinancing Policies

HUD proposed adding a new paragraph (f) to § 92.254 requiring participating jurisdictions that use HOME funds for homebuyer assistance to develop and follow written policies for underwriting homeownership assistance, preventing predatory lending (i.e., ensuring responsible lending), and resubordinating HOME debt in the event of refinancing of private debt.

Comments: Several commenters recommended that HUD clarify the proposed language by adopting industry terms of art such as housing payment ratio and installment debt ratio. Commenters also emphasized that participating jurisdictions should be encouraged to fully and carefully evaluate borrower credit and develop strict anti-predatory lending guidelines.

HUD Response: HUD agrees with the commenters about the importance of fully and carefully evaluating borrower credit. Accordingly, HUD maintains the requirement in the proposed rule that participating jurisdictions establish underwriting policies providing underwriting standards for homeownership assistance that evaluate housing debt and overall debt of the family, the amount of assistance request, monthly expenses of the family, assets available to acquire the housing, and financial resources to sustain homeownership. However, at this final rule stage, HUD has substituted the term ''responsible lending'' for ''anti-predatory lending'' on the basis that such term better reflected the objective of having underwriting policies that strive to ensure that the HOME funds used for homeownership opportunities in which the other (non-HOME) mortgage debt is affordable to and sustainable by the borrower.

With respect to sustainable homeownership, it is important to note that since issuance of the December 16, 2011, proposed rule, the Consumer Financial Protection Bureau (CFPB) completed its rulemaking under section 1411 of subtitle B of Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–230, 124 Stat. 1736, approved July 21, 2010) (Dodd-Frank Act). Section 1411 added a new section 129C to the Truth-in-Lending Act (TILA) to provide minimum standards for considering a consumer's ability to repay a residential mortgage. The CFPB published a final rule on January 30, 2013, at 78 FR 6408, entitled, ''Ability-to-Repay and Qualified Mortgage Standards under the Truth in Lending Act (Regulation Z)'' (QM rule) to implement the provisions of new section 129C of TILA. Section 1412 of the Dodd-Frank Act requires that HUD, with regard to mortgages insured under the National Housing Act; the Department of Veterans Affairs (VA), with regard to a loan made or guaranteed by the Secretary of Veterans Affairs; the Department of Agriculture (USDA), with regard to loans guaranteed by the Secretary of Agriculture pursuant to 42 U.S.C. 1472(h); and the Rural Housing Service (RHS), with regard to loans insured by the RHS, prescribe rules in consultation with the CFPB to define the types of loans they insure, guarantee, or administer, as the case may be, that are ''qualified mortgages,'' and revise, add to, or subtract from the statutory criteria used to define a qualified mortgage. Although the CFPB final rule established certain minimum requirements for creditors making ability-to-repay determinations, those requirements are not designed to address the specific homeownership concerns of the HOME program, which pertain to the ability of low-income homebuyers to sustain homeownership. While the CFPB requirements are a good starting point for assessing the appropriateness of private first mortgages, a participating jurisdiction's lending policy will need to consider additional factors because HOME-assisted homebuyers are low-income.

Therefore, as noted earlier, HUD is adopting the requirement in the proposed rule that participating jurisdictions establish underwriting and responsible lending policies that help to ensure that HOME-assisted homebuyers obtain mortgages that they have the ability to repay. HUD will issue guidance on responsible lending that explains the CFPB ability-to-pay principles and suggests additional considerations that would be appropriately included in a lending policy applicable to low-income homebuyers. The final lending policies, however, rest with the judgment of the participating jurisdiction, which is in the best position to craft responsible lending policies based on the populations they serve.

r. Converting Rental Units to Homeownership Units for Existing Tenants (§ 92.255)

HUD proposed a revision to § 92.255 to clarify that the existing regulation does not permit conversion of an entire HOME-assisted multifamily rental project to condominium ownership during the period of affordability and that tenants' refusal to purchase their rental housing unit does not constitute grounds for eviction or failure to renew the lease.

Comments: A few commenters supported the clarification that tenants cannot be evicted or lose their lease because they cannot or will not purchase the HOME rental unit they occupy. A commenter stated that this provision conflicted with LIHTC rules.

HUD Response: HUD is adopting the proposed rule language without change. HUD disagrees that this provision conflicts with LIHTC rules, which require a unit to remain a rental unit during the 15-year compliance period. LIHTC does permit long-term lease-purchase agreements to permit a tenant to purchase a unit after the 15-year rental period has elapsed. HUD does not see a parallel rationale, since the provision for HOME rental units applies during the HOME period of affordability.

s. Set-Aside for CHDOs (§ 92.300)

Housing Owned, Developed or Sponsored by a CHDO

HUD proposed to codify longstanding definitions of housing that is owned, developed, or sponsored by a CHDO currently established in HUD's administrative guidance into the regulation in § 92.300(a)(2) through (a)(6), with minimal revisions. The proposed definitions included the existing requirement that a CHDO must have demonstrated development capacity to undertake development of a project in order to receive CHDO funds, regardless of whether the CHDO would be the ''owner,'' ''developer,'' or ''sponsor'' of the project. The proposed rule differentiated between the roles of CHDO ''sponsors'' and CHDO ''developers'' of rental housing, making clear that a developer of HOME-assisted rental housing must also own the housing during the period of affordability, whereas a sponsor may sell the HOME-assisted rental housing to a non-profit organization or another CHDO.

Comments: HUD received many comments on the proposed changes to the definitions of own, develop and sponsor that were included in the proposed rule. Several commenters expressed concerns about the modifications to the definition of ''developer'' and the specificity in the ''sponsor'' model. Other commenters expressed concern about the requirements of CHDOs to demonstrate development experience in order to access CHDO set-aside funds, stating that in many areas CHDOs lack capacity to develop housing, particularly in rural or non-metro areas.

HUD Response: In response to public comment, HUD is establishing a set of definitions for the CHDO as ''owner, developer, or sponsor'' that facilitates participation of CHDOs that have the capacity to own affordable rental housing, but do not have the capacity to develop such housing. These modified definitions would allow non-profit organizations an increased ability to access the CHDO set-aside funds to assist their neighborhoods address their affordable housing needs. In this final rule, HUD establishes a definition of ''owner'' that allows for a CHDO to receive CHDO set-aside funds if it has the capacity to own and operate HOME-assisted housing, even if it does not have the capacity to develop it. The new definition of owner for CHDOs should aid large rural States, which consistently experience great difficulty in developing and retaining capable CHDOs. The majority of the changes in the definition of CHDO as the ''owner,'' ''developer,'' or ''sponsor'' pertain to HOME-assisted rental housing. A CHDO that is an ''owner'' would be required to own the HOME project during development and throughout the period of affordability, and would be required to hire a project manager or have a contract with a development contractor to oversee all aspects of the development. A CHDO that is a ''developer'' of rental housing must arrange for the construction financing and is in sole charge of the construction, and must own the HOME-assisted housing throughout the period of affordability. A CHDO that is a ''sponsor'' of HOME-assisted rental housing ''owns'' and ''develops'' the rental housing project that it agrees to convey to a private nonprofit organization at a predetermined time after completion of the development of the project.

For HOME-assisted homebuyer projects, the housing is ''developed'' by the CHDO if it is the owner (in fee simple absolute) and developer of new housing that will be constructed or existing substandard housing that is owned or will be acquired by the CHDO and rehabilitated for sale to low-income families, in accordance with § 92.254. To be the ''developer,'' the CHDO must arrange financing of the project and be in sole charge of construction.

CHDO Must Be Sole General Partner in Limited Partnerships and Limited Liability Corporations

HUD proposed language to clarify the allowable ownership structures and roles of CHDOs when they are participating in limited partnerships or limited liability corporations as developers or sponsors of HOME-assisted projects.

Comments: HUD received several comments opposing the requirement that the CHDO, or its subsidiary, must be the ''sole general partner'' in a limited partnership, or the sole managing member of a limited liability company (LLC), when acting as the ''developer'' or ''sponsor'' of rental housing owned by a limited partnership or an LLC. Commenters expressed concern about this requirement, specifically as it relates to securing financing for projects that will receive

Low Income Housing Tax Credits (LIHTCs). Commenters described and supported ownership structures in which the CHDO is the ''co-general'' partner, with another entity that may or may not have control or authority in decision making on behalf of the ownership entity.

HUD Response: The HOME regulations, at § 92.300(a)(1) have always required that, if a CHDO owns a project in partnership, or owns the project through its wholly-owned for-profit or non-profit subsidiary, it must be the managing general partner. This requirement implements the statutory intent of the CHDO set-aside to provide funding for housing under the control of CHDOs, in order to help ensure that community needs are met. In the proposed rule, HUD is extending its existing requirement to LLCs, which are ownership entities very similar to limited partnerships. The other partnership arrangements raised by commenters, such as ''co-general partners,'' do not meet the statutory requirements for CHDOs. HUD is adopting the proposed rule language without change.

Ownership ''In Fee Simple Absolute''

HUD proposed language that CHDOs must own the HOME-assisted housing in ''in fee simple absolute.''

Comments: Several commenters opposed the requirement that the property be owned by the CHDO ''in fee simple absolute.'' Commenters requested that HUD consider housing ''owned'' by a CHDO if it is subject to a long-term ground lease.

HUD Response: HUD agrees with the comments submitted and, at this final rule stage, has revised this requirement to include long-term ground leases in the definition of housing owned by a CHDO. The revision accommodates ownership structures where the ownership of the land is not permitted due to other restrictions (e.g., land trusts).

Replacement of CHDO for Cause

The proposed rule required that rental housing that is developed or owned by a CHDO must be owned by a CHDO throughout the period of affordability. Should a CHDO be removed as owner, HUD proposed that the owner of the HOME-assisted housing be replaced by another CHDO.

Comments: Several commenters opposed the requirement that if a CHDO is removed for cause, it must be replaced with another CHDO. Other commenters requested additional guidance on what constitutes ''for cause.'' Some commenters requested specific guidance and clarification about how the requirements of this section will be applied.

HUD Response: CHDO funds are required to be used for projects that will be owned, developed or sponsored by a CHDO. HUD has determined that, if a CHDO is removed for cause, meaning it violated the written agreement or partnership agreement, it must be replaced by another CHDO in order for the project to remain an eligible CHDO set-aside project. HUD will issue additional guidance on all CHDO requirements established in this final rule.

t. Other Federal Requirements

1. Affirmative Marketing; Minority Outreach Program (§ 92.351)

HUD proposed revising § 92.351 to: (1) remove the provision that affirmative marketing requirements do not apply to tenants with tenant-based rental assistance because HOME-assisted rental housing must always be affirmatively marketed without regard to whether the potential tenant has rental assistance; and (2) expand the applicability of affirmative marketing provisions to HOME-funded programs in addition to projects with 5 or more HOME-assisted units.

Comments: Several commenters supported the expanded affirmative marketing requirements. One commenter was concerned that a one-size-fits-all approach to affirmative marketing would have limited effectiveness. Another commenter requested clarification on how affirmative marketing requirements would apply to a downpayment assistance program in which homebuyers choose their own homes.

HUD Response: In accordance with 24 CFR 92.351, participating jurisdictions are required to adopt affirmative marketing procedures for their programs and projects. The specific procedures to be used will depend on the type and size of the project. A participating jurisdiction administering a downpayment assistance program would be required to affirmatively market the program (i.e., the availability of federal funds for downpayment assistance), rather than units available for purchase. HUD is adopting the proposed rule language without change.

2. Environmental Review (§ 92.352)

HUD proposed revising § 92.352 to clarify that the applicability of environmental review regulations is based on the type of HOME project (new construction, rehabilitation, acquisition) or activity (tenant-based rental assistance), not the particular cost paid with HOME funds.

Comments: A few commenters suggested the HUD adopt a two-step environmental review process, whereby project owners could incur costs for project predevelopment activities that would be ''exempt'' under 24 CFR part 58, and participating jurisdictions could reimburse those costs after completion of environmental review requirements for the physical activity.

HUD Response: The HOME Program regulation is not the appropriate vehicle for proposing or effectuating changes to the implementing regulations for the National Environmental Policy Act and related statutes. This final rule enables participating jurisdictions to reimburse certain project-related soft costs (e.g., architectural and engineering costs) incurred up to 24 months before the commitment of HOME funds to a project, without the need for an environmental review to be performed for the soft costs. For soft costs incurred after commitment of HOME funds to a project site, a two-step process would inappropriately facilitate participating jurisdictions committing and expending HOME funds on projects before the completion of an environmental review on the project. It is not inappropriate for participating jurisdictions to expend HOME funds on projects (other than on the environmental review) before it is certain that they will proceed.'' HUD is adopting the proposed rule language without change.

3. Labor (§ 92.352)

HUD proposed revising § 92.352(a)(3) to remove the reference to HUD Handbook 1344.1 Federal Labor Standards Compliance in Housing and Community Development Programs and replace this reference with a regulatory citation. HUD did not receive any comments on the proposed change and is adopting the proposed rule language without change.

4. Conflict of Interest (§ 92.356)

Financial Interest or Benefit

HUD proposed revising the conflict of interest provisions of § 92.356(b) to clarify that the covered conflict involves a financial benefit or interest, and that covered familial relationships are limited to immediate family members. The proposed change would align the HOME provisions with the CDBG regulations. HUD did not receive comments on this revision and is adopting the proposed rule language without change.

Occupancy of HOME-Assisted Units

HUD proposed revising § 92.356(f)(1) to prohibit immediate family members of an officer, employee, agent, elected or appointed official or consultant of an owner, developer, or sponsor from occupying a HOME-assisted affordable housing unit in a project.

Comments: A commenter expressed concern that the proposed provision was vague, and could result in the immediate family members of project owners being prohibited from occupying a HOME-assisted unit in perpetuity, rather than during the applicable HOME period of affordability. Another commenter requested that HUD define immediate family member. A commenter recommended that HUD expand the prohibition to persons in an intimate relationship with an officer or employee of the owner, developer or sponsor of a HOME-assisted project. Another commenter asked that HUD clarify that the existing regulatory provision that applies to officers and employees of the owner, developer or sponsor of HOME-assisted housing does not prohibit a tenant of a HOME-assisted property from joining the board of a CHDO.

HUD Response: HUD agrees that the prohibition on occupying HOME-assisted housing should apply only during the HOME affordability period, not to the entire period of ownership of the entity that received HOME assistance, and has revised the language in § 92.356(b) accordingly. In this final rule, HUD has revised the language in paragraph (b) to specify the familial relationships that are considered immediate family members. HUD declines to include persons in intimate relationships with officers or employees of the owner, developer or sponsor in the prohibition due to the difficulty of establishing the nature and existence of such relationships. HUD agrees with the commenter that existing tenants of HOME units should not be prohibited from joining a CHDO or non-profit board simply because they occupy a HOME-assisted unit. HUD will address this issue in guidance. HUD is adopting this provision with the two clarifications described above.

u. Program Administration

1. The HOME Investment Trust Fund (§ 92.500)

Interest-Bearing Accounts for Program Income

HUD proposed amending § 92.500(c) to require that participating jurisdictions' local HOME accounts be interest-bearing.

Comments: A commenter indicated that its State law prohibited jurisdictions from maintaining interest-bearing accounts for Federal funds and asked how it could comply with the proposed requirement.

HUD Response: If state law prohibits a jurisdiction from maintaining interest-bearing accounts, the participating jurisdiction would have to request a waiver of this provision. HUD is adopting the proposed rule language without change.

Separate Deadline for CHDO Set-Aside Funds

To provide an incentive for participating jurisdictions to proactively manage CHDO set-aside funds by moving them from nonperforming CHDOs to performing CHDOs before they expire, HUD proposed adding a new paragraph at § 92.500(d)(1)(C) to establish a separate 5-year expenditure deadline for community housing development organization set-aside funds.

Comments: A few commenters expressed concern regarding the establishment of this deadline, stating that it might increase the amount of CHDO set-aside funds subject to recapture and negatively affect their CHDO programs.

HUD Response: HUD is adopting the proposed rule language without change to ensure that CHDO funds are actively managed and CHDO set-aside funds are initially awarded or reallocated by participating jurisdictions to the best performing organizations. The 5-year deadline for expending CHDO set-aside funds will parallel the existing regulatory 5-year deadline for expenditure of other HOME funds, with HUD deobligating shortfall amounts and reallocating them in accordance with the provisions of NAHA and implementing regulations.

2. Program Disbursement and Information System (§ 92.502)

Reporting of Program Income

HUD proposed adding a provision to § 92.502(a) clarifying that participating jurisdictions are required to report all program income earned on HOME funds in IDIS.

Comments: Several commenters disagreed with the proposed requirement in paragraph (a) in § 92.502, stating that it will require participating jurisdictions to report all program income earned on HOME funds in IDIS. A few commenters stated that the current system of reporting program income is working and should be maintained.

A commenter requested implementation flexibility with respect to reporting program income in IDIS and stated that reporting program income in IDIS should only be required if it is received after the effective date of the new regulations. The same commenter stated that the regulations should not be required to ensure that program income received and held by one state recipient is used before it draws HOME funds from its HOME Treasury Account to pay costs incurred by another state recipient or CHDO.

HUD Response: HUD has found that some participating jurisdictions are not consistently reporting program income in IDIS and are not expending program income before drawing down additional HOME funds from their HOME Treasury Accounts. HUD recently made changes to IDIS to assist participating jurisdictions to accurately report program income, including program income retained by state recipients and subrecipients. Program income that is retained by one state recipient does not have to be expended before a state participating jurisdiction draws funds for another state recipient. HUD is adopting the proposed rule language without change. As a result, participating jurisdictions will be required to record all program income received after the effective date of this rule in IDIS.

Access to HUD's Integrated Disbursement and Information System (IDIS)

HUD proposed revising § 92.502(e) to clarify that even though other participants may be permitted to access HUD's disbursement and information system, only participating jurisdictions and State recipients (if permitted by the State) may request disbursement.

Comments: Several commenters objected to the new language in paragraph (e) in § 92.502 clarifying that only participating jurisdictions and State recipients may request disbursements from IDIS. A few commenters stated that HUD should grant exceptions to the proposed rule to permit subrecipients designated under state statute to administer the HOME program. A commenter stated that requiring the State to request every HOME draw would add cost and reduce efficiency, adding an extra layer of administration.

HUD Response: The proposed rule language was added to the regulations to codify HUD's longstanding administrative guidance with respect to the authority to request drawdown of funds from IDIS. Participating jurisdictions that have been permitting entities other than State recipients to draw funds have done so in violation of that administrative guidance. It is imperative to the integrity of the program that the ability to request draws from IDIS be limited to the participating jurisdiction or State recipients. HUD is adopting the proposed rule language without change. State agencies or instrumentalities designated by the state to administer the HOME program (e.g., housing finance agencies) as the state participating jurisdiction will retain the ability to request disbursement in IDIS. Other organizations may be allowed to access the system and perform various administrative functions, but will not be able to request disbursement of funds.

3. Repayments (§ 92.503)

HUD proposed revising § 92.503 to provide that, when repayment of HOME funds is required, HUD will instruct a participating jurisdiction whether to repay funds to the HOME Investment Trust Fund Treasury account or the local account. HUD did not receive any comments on this proposed change and is adopting the rule language without change.

4. Participating Jurisdiction Responsibilities; Written Agreements; On-Site Inspection (§ 92.504)

Required Policies and Procedures

HUD proposed revising § 92.504(a) to: Require participating jurisdictions to develop and follow written policies, procedures, and systems, including a system for assessing risk of activities and projects, and a system for monitoring entities, to ensure that HOME requirements are met; to make explicit that State recipients are included in the entities that must be evaluated annually; and clarify that the evaluation must include a review of each entity's compliance with HOME program requirements.

Comments: Some commenters supported the requirement that participating jurisdictions develop and follow written policies and procedures to administer their HOME programs. Another commenter stated that HUD should provide training and technical assistance to assist participating jurisdictions in developing the required policies and procedures. Other commenters requested that HUD clarify what constitutes risk assessment or how risk assessment should be conducted.

HUD Response: HUD has developed numerous training and technical assistance products relating to appropriate policies and procedures. These products include classroom training with an accompanying manual on how participating jurisdictions can determine risk elements in their HOME program and how to develop and implement a risk assessment process. HUD anticipates developing additional guidance and training on appropriate policies and procedures related to the HOME program. HUD is adopting the proposed rule language without change.

Written Agreements

HUD proposed several revisions to § 92.504(c), which sets forth the provisions that are required in participating jurisdictions' written agreements with participants in their HOME programs, including state recipients, subrecipients, owners, developers, sponsors, contractors, and CHDOs to reflect new or altered requirements that would be added to other sections of the HOME regulations and to improve the ability of participating jurisdictions to use written agreements to ensure compliance.

Comments: HUD received numerous comments related to § 92.504(c). However, these comments addressed the underlying requirement established elsewhere in the proposed rule rather than the requirement to include the requirement in the written agreement. Several commenters stated that HUD should not require the inclusion of an address in the written agreement between the participating jurisdiction and the owner, developer or sponsor of the housing because an address may not have been assigned to a property at the time HOME funds are committed to the project.

HUD Response: HUD has addressed comments on specific requirements in the sections of this preamble relating to those requirements. HUD agrees that the requirement that a project address be included in the written agreement between the participating jurisdiction and an owner, developer, or sponsor of housing may not be possible in all cases. At this final rule stage, HUD has revised the language at § 92.504(c)(3)(i) to permit the inclusion of the legal description of the property location if an address has not been assigned to the property to which HOME funds are being committed. The final rule is also revised to require that the project owner provide the property address and unit numbers to the participating jurisdiction no later than the date of initial occupancy of each unit, rather than at project completion. In response to questions directed to HUD regarding the fees that owners, developers or sponsors of housing can charge in HOME projects or for HOME assistance, HUD has revised § 92.504(c)(3)(xi) to more explicitly describe the permissibility of fees for rental projects and homebuyer projects.

On-Site Inspections and Financial Oversight

HUD proposed revising § 92.504(d)(1) to require on-site completion inspections of all completed HOME-assisted units, and proposing different sampling and frequency schedules in the requirements for ongoing periodic inspections of rental property in § 92.504(d)(1) to provide participating jurisdictions with flexibility to implement risk-based monitoring. HUD proposed that participating jurisdictions must conduct inspections at least every 3 years, but more frequently if deficiencies are revealed during inspection. The proposed rule also required that inspections be performed on a larger number of HOME-assisted units.

Comments: Several commenters expressed concern that the requirement to inspect 20 percent of the HOME units in a building would be too onerous for participating jurisdictions that have HOME projects with a large number of HOME units. Other commenters supported the proposed rule requirement for inspection at the time of project completion and during the period of affordability. A few commenters opposed reducing the frequency of periodic inspections from what is currently required in the existing regulation. Several commenters recommended that HUD allow participating jurisdictions to hire contractors for these inspections, or to accept the inspections of other funders of the project, if any. Some commenters suggested that the proposal to require a re-inspection within 12 months of when a deficiency that must be corrected is observed is too long a time to have lapse. A commenter expressed concern over how these requirements could be implemented for single-family and scattered site rental units. Some commenters suggested that the requirement to re-inspect HOME-assisted properties within 12 months if there are any observed deficiencies could result in a costly and disproportionate response, (e.g., a minor deficiency should not necessitate a second onsite inspection, which would be particularly costly in rural or remote areas). A few commenters stated that this requirement appeared to reduce flexibility and eliminate the opportunity for the participating jurisdiction to establish a risk-based approach.

HUD Response: HUD does not agree that the requiring inspection of 20 percent of HOME units in each building would result in burdensome sample sizes, particularly when the inspections may occur only once every three years. This percentile was chosen to facilitate alignment with the sampling requirements for inspections currently required for LIHTC projects. HOME funds are frequently combined with LIHTCs in affordable housing projects. However, HUD has removed this specific requirement from the final rule in favor of using statistically valid samples, noting that in some projects a different sample size may be appropriate. HUD plans to issue guidance about appropriate sampling for the purposes of ongoing physical inspections of HOME-assisted units. HUD proposed the 3 year time frame to facilitate alignment of inspections for HOME-assisted projects with other funding sources, such as LIHTC. Participating jurisdictions may contract with third parties to conduct these inspections and, in the future, inspections performed by other funders may be permitted once administrative alignment at the Federal level has been achieved. Participating jurisdictions also may establish inspection schedules that involve more frequent inspections or larger sample sizes. This final rule retains the requirement that a follow up on-site inspection must be performed within 12 months to ensure that health and safety violations or other serious and significant defects do not exist in the property, but permits participating jurisdictions to establish a list of minor deficiencies for which it may accept third-party verification.

Financial Oversight

HUD proposed a new a requirement pertaining to annual financial oversight of HOME-assisted rental properties in § 92.504(d)(2). The purpose of this requirement is to enable participating jurisdictions to identify HOME-assisted projects that may become financially troubled before problems become severe. HUD proposed that this requirement apply only to projects with 10 or more HOME-assisted unit and specifically requested public comment on whether a different applicability threshold was appropriate.

Comments: Some commenters expressed concern that HOME administrative funds would not provide sufficient resources to pay for type of oversight. Some requested training and guidance from HUD about how to monitor the financial condition of projects, and other commenters requested that HUD provide software to participating jurisdictions to assist them. Two commenters suggested that HUD adopt a higher number of units (between 20 and 30 HOME units) as the unit threshold for applicability of this requirement.

HUD Response: A threshold of 10 HOME-assisted units or more will result in just over one-third of all HOME rental projects being subject to this requirement (34 percent of HOME projects completed in the last 10 years have 10 or more HOME-assisted units). Because many rental projects with 10 or more HOME-assisted units are quite large (41 percent of projects with 10 or more HOME units contain 26 or more total units), HUD finds the requirement for an annual examination of financial condition appropriate. This final rule requires that participating jurisdictions examine the financial condition of HOME-assisted rental projects with 10 or more HOME-assisted units annually. HUD will provide guidance and training on how to implement this requirement.

5. Applicability of Uniform Administrative Requirements (§ 92.505)

HUD proposed revising § 92.505(a) and (b) to add a reference to the regulations implementing OMB Circular No. A–87 (2 CFR part 225) and OMB Circular No. A–122 (2 CFR part 230). Circular A–87 is entitled ''Cost Principles for States, Local, and Indian Tribal Governments.'' Circular A–122 is entitled ''Cost Principles for Non-Profit Organizations.'' The provisions of these cost principle circulars are codified in the government-wide regulations found at 2 CFR part 225 and 2 CFR part 230, respectively. HUD received no comments on this proposed change and is adopting the proposed rule language without change.

6. Recordkeeping (§ 92.508)

HUD proposed revising § 92.508 to require participating jurisdictions to maintain records pertaining to new requirements that would be established under this rule.

Comments: HUD received a few comments related to record keeping revisions in the proposed rule. Some commenters expressed concern that participating jurisdictions may find it difficult to ensure that all of the proposed recordkeeping changes are implemented should HUD adopt the proposed changes, and requested technical assistance, training or software to assist in the requirements. Other commenters stated that the proposed recordkeeping requirements pose an administrative and paperwork burden on participating jurisdictions.

HUD Response: Whenever HUD establishes a requirement for a grant program, generally HUD creates corresponding recordkeeping requirements to enable HUD to monitor for compliance with the requirements governing the grant. The estimated burden associated with new recordkeeping requirements is included in the Paperwork Reduction Act submission for this rule. HUD is adopting the proposed rule language. HUD plans to implement comprehensive training and technical assistance initiatives to assist program participants in understanding and implementing all provisions of this rule.

7. Corrective and Remedial Actions (§ 92.551)

HUD proposed amending § 92.551(c) by revising and adding to the remedial actions available for imposition on a participating jurisdiction. The current provision for requiring matching contributions would be expanded to include establishment of a remedial plan to make up a matching contribution deficit.

Two new remedial actions, which are establishing procedures to ensure compliance with HOME requirements and forming a consortium with the urban county, would also be added. The existing provision under which HUD may change the method of payment from advance to reimbursement would be expanded to require submission of supporting documentation before payment is made. Finally, the proposed change would provide that HUD may determine the participating jurisdiction to be high-risk and impose special conditions or restrictions in accordance with 24 CFR 85.12. HUD did not receive any comments on these changes and is adopting the proposed rule language without change.

8. Hearing Proceedings (§ 92.552)

HUD proposed to revise § 92.552(b) to remove the reference that subpart B of 24 CFR part 26 governs hearing proceedings. HUD did not receive any comments on this change and the final rule removes this reference.

9. Other Federal Requirements (§ 92.614)

HUD proposed a minor technical change to § 92.614. HUD proposed to move the reference to the affirmative marketing requirements in § 92.351(a) from § 92.614(b) to § 92.614(a)(3). HUD did not receive any comments on this change and is adopting the proposed rule language without change.

III. Findings and Certifications

Regulatory Planning and Review–Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This rule was determined to be a ''significant regulatory action,'' as defined in section 3(f) of the order (although not an economically significant regulatory action under the order). HUD submits that updating the HOME program regulations is consistent with the objectives of Executive Order 13563 to reduce burden, as well as the goal of modifying and streamlining regulations that are outmoded and ineffective.

This rule makes several changes to the HOME Program regulations, which are over 16 years old, and without a significant update during that period. The changes in this rule, for which public comment was received and considered, are designed to improve the performance of the program. The rule updates definitions and adds new terminology relevant to the housing market and real estate market; modifies the eligibility requirements of community housing development organizations that seek to participate in the HOME program to ensure that they have the capacity to undertake their responsibilities under the HOME Program, establishes deadlines for project completion in an effort to ensure that housing units needed by low-income households are in fact constructed and made available; strengthens conflict of interest provisions; and clarifies language in several existing HOME regulatory provisions to remove any possible ambiguity as to what is expected of participating jurisdictions, community housing development organizations and other entities that participate in the HOME program.

The rule is an administrative one and so the economic impacts are almost entirely within the program. The requirements that improve program oversight and avoid noncompliance will lead to a more efficient allocation of resources within the program and the provision of more affordable housing. Some elements of the rule have the potential to impose compliance costs on participants. However, these costs will either be subsidized by HUD or can be avoided through more efficient behavior on the part of the participating jurisdictions and developers. Although the rule is expected to create some efficiencies within the HOME program, the rule it is not expected to have a measurable impact beyond the grant program. The costs and benefits of the regulatory changes made by this rule are more fully discussed in the regulatory impact analysis (RIA) that accompanies this rule and can be found at *http://www.hud.gov/offices/cpd/affordablehousing/programs/home/.*

The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202–708–3055 (this is not a toll-free number).

Paperwork Reduction Act

The information collection requirements contained in this rule were submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), and assigned OMB control number 2506–0171. For the information collection and recordkeeping changes made by this final rule, HUD estimated that annually the number of respondents would be 180,487, responding only once annually but with varying hours per response, resulting in a total annual burden hours of 208,886. HUD estimated the total annual cost of $31 per hour, resulting in a total cost of $6,475,450.00. HUD's supporting statement that is submitted to OMB describes in more detail the changes made by this final rule to the existing HOME program information collection and recordkeeping requirements can be found on the HOME program Web site.[9] This Web page also includes a chart that describes how this rule added or reduced the existing information collection requirements. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule addresses the allocation and use of formula grant funds by state and local jurisdictions (participating jurisdictions) under the HOME program. As discussed in the preamble, this rule updates the regulations governing the HOME program, which have not been updated in 16 years. The rule does not alter the allocation of funds under the HOME program, but is directed to revising the HOME program regulations to: Reflect changes in the housing market that have occurred over the past 16 years; clarify and enhance the roles and responsibilities and accountability of participating jurisdictions; and strengthen HUD's own oversight of the program.

Section 601 of the Regulatory Flexibility Act defines the term ''small entity'' to include small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000. Currently, there are 644 jurisdictions participating in the HOME program, and 33 jurisdictions meet the definition of small governmental jurisdictions. HUD is cognizant of the greater difficulties that small entities may have in meeting regulatory requirements, but as noted in the preamble, the requirements governing this program are designed to ensure that the use of HOME program grant funds, are consistent with statutory requirements and the objectives of the HOME program. Additionally, as a grant program, the program provides that up to 10 percent of a participating jurisdiction's annual allocation may be used for program planning and program administration.

Nevertheless HUD has strived to meet the objective of responsible and accountable use of grant funds without imposing undue burden on small jurisdictions or any other size jurisdiction. As discussed earlier in this preamble, several provisions adopted by this final rule are best practices, not requirements. As also discussed earlier in this preamble, additional costs that may arise as result of enhanced accountability and monitoring may be paid with HOME grant funds as project-

[9] See *http://www.hud.gov/offices/cpd/affordablehousing/programs/home/.*

related soft costs. Further the majority of the provisions in this rule are applicable only to projects to which HOME funds are committed after the effective date of this final rule, which allows participating jurisdictions to better plan the expenditure of their funds. For new property standards, this final rule allows an additional 18 months after the publication date of this final rule to meet new standards. Section III of this preamble, which provides an overview of key changes made to the HOME program regulations at the final rule stage highlights decisions that HUD made to further minimize burden as a result of the update of 16-year old regulations. Such changes include adopting a 12-month timeframe for committing HOME funds for reconstruction of a unit that was destroyed; making the cost of conducting unit inspections and determining income of tenant-based rental assistance applicants or recipients as an eligible project-related cost; and eliminating the requirement for written standards for methods and materials for new construction projects, to name a few of the burden reduction changes.

Accordingly, for these reasons and as further discussed in the preamble, HUD has determined that this rule would not have a significant economic impact on a substantial number of small entities.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either (1) imposes substantial direct compliance costs on state and local governments and is not required by statute, or (2) preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Order. This rule does not have federalism implications and would not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Order.

Environmental Review

A Finding of No Significant Impact with respect to the environment was made, at the proposed rule stage, in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding remains applicable to this final rule and is available for public inspection during regular business hours in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the Finding by calling the Regulations Division at (202) 402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8339.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule will not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995.

List of Subjects

24 CFR Part 91

Aged, Grant programs-housing and community development, Homeless, Individuals with disabilities, Low and moderate income housing, and Reporting and recordkeeping requirements.

24 CFR Part 92

Administrative practice and procedure, Grant programs-housing and community development, Low and moderate income housing, Manufactured homes, Rent subsidies, and Reporting and recordkeeping requirements.

For the reasons stated in the preamble, HUD amends 24 CFR parts 91and 92, as follows:

PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS

■ 1. The authority citation for part 30 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, and 12901–12912.

■ 2. In § 91.220, revise paragraphs (l)(2)(i) and (ii), redesignate paragraph (l)(2)(iv) as paragraph (l)(2)(vii), and add new paragraphs (l)(2)(iv), (v), and (vi), to read as follows:

§ 91.220 Action plan.

* * * * *

(l) * * *

(2) *HOME.* (i) For HOME funds, a participating jurisdiction shall describe other forms of investment that are not described in 24 CFR 92.205(b). HUD's specific written approval to the jurisdiction is required for other forms of investment, as provided in § 92.205(b). Approval of the consolidated plan or action plan under § 91.500 or the failure to disapprove the consolidated plan or action plan does not satisfy the requirement for specific HUD approval for other forms of investment.

(ii) If the participating jurisdiction intends to use HOME funds for homebuyers, it must set forth the guidelines for resale or recapture, and obtain HUD's specific, written approval, as required in 24 CFR 92.254. Approval of the consolidated plan or action plan under § 91.500 or the failure to disapprove the consolidated plan or action does not satisfy the requirement for specific HUD approval for resale or recapture guidelines.

* * * * *

(iv) If the participating jurisdiction intends to use HOME funds for homebuyer assistance or for rehabilitation of owner-occupied single family housing and does not use the HOME affordable homeownership limits for the area provided by HUD, it must determine 95 percent of the median area purchase price and set forth the information in accordance with 24 CFR 92.254(a)(2)(iii).

(v) The jurisdiction must describe eligible applicants (e.g., categories of eligible applicants), describe its process for soliciting and funding applications or proposals (e.g., competition, first-come first-serve) and state where detailed information may be obtained (e.g., application packages are available at the office of the jurisdiction or on the jurisdiction's Web site).

(vi) The participating jurisdiction may limit the beneficiaries or give preferences to a particular segment of the low-income population only if described in the action plan.

(A) Any limitation or preference must not violate nondiscrimination requirements in 24 CFR 92.350, and the participating jurisdiction must not limit or give preferences to students.

(B) A limitation or preference may include, in addition to targeting tenant-based rental assistance to persons with special needs, as provided in 24 CFR 92.209(c)(2), limiting beneficiaries or giving preferences to such professions as police officers, teachers, or artists.

(C) The participating jurisdiction must not limit beneficiaries or give a preference to all employees of the jurisdiction.

(D) The participating jurisdiction may permit rental housing owners to limit tenants or give a preference in accordance with 24 CFR 92.253(d) only if such limitation or preference is described in the action plan.

* * * * *

■ 3. In § 91.320, revise paragraphs (k)(2)(i) and (ii), redesignate paragraph (k)(2)(iv) as paragraph (k)(2)(vii), and add new paragraphs (k)(2)(iv), (v), and (vi) to read as follows:

§ 91.320 Action plan.

* * * * *

(k) * * *

(2) *HOME.* (i) The State shall describe other forms of investment that are not described in 24 CFR 92.205(b). HUD's specific written approval is required for other forms of investment, as provided in § 92.205(b). Approval of the consolidated plan or action plan under § 91.500 or the failure to disapprove the consolidated plan or action plan does not satisfy the requirement for specific HUD approval for resale or recapture guidelines.

(ii) If the State intends to use HOME funds for homebuyers, it must set forth the guidelines for resale or recapture, and obtain HUD's specific, written approval, as required in 24 CFR 92.254. Approval of the consolidated plan or action plan under § 91.500 or the failure to disapprove the consolidated plan or action does not satisfy the requirement for specific HUD approval for other forms of investment.

* * * * *

(iv) If the participating jurisdiction intends to use HOME funds for homebuyer assistance or for rehabilitation of owner-occupied single family housing and does not use the HOME affordable homeownership limits for the area provided by HUD, it must determine 95 percent of the median area purchase price and set forth the information in accordance with 24 CFR 92.254(a)(2)(iii).

(v) The State must describe eligible applicants (e.g., categories of eligible applicants), describe its process for soliciting and funding applications or proposals (e.g., competition, first-come first-serve; subgrants to local jurisdictions) and state where detailed information may be obtained (e.g., application packages are available at the office of the State or on the State's Web site).

(vi) The participating jurisdiction may limit the beneficiaries or give preferences to a particular segment of the low-income population only if described in the action plan.

(A) Any limitation or preference must not violate nondiscrimination requirements in 24 CFR 92.350, and the participating jurisdiction must not limit or give preferences to students.

(B) A limitation or preference may include, in addition to targeting tenant-based rental assistance to persons with special needs as provided in 24 CFR 92.209(c)(2), limiting beneficiaries or giving preferences to persons in certain occupations, such as police officers, firefighters, or teachers.

(C) The participating jurisdiction must not limit beneficiaries or give a preference to all employees of the jurisdiction.

(D) The participating jurisdiction may permit rental housing owners to limit tenants or give a preference in accordance with 24 CFR 92.253(d) only if such limitation or preference is described in the action plan.

* * * * *

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

■ 4. The authority citation for part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701–12839.

■ 5. In § 92.2:
■ a. Revise the introductory text;
■ b. Add, in alphabetical order, the definition of *CDBG program;*
■ c. Revise paragraphs (1) and (2)(i) of the definition of *Commitment;*
■ d. Revise paragraphs (3)(ii) and (3)(iii), add paragraph (3)(iv), and revise paragraphs (4), (5), and (9) of the definition of *Community housing development organization;*
■ e. Add, in alphabetical order, the definition of *Consolidated plan;*
■ f. Revise the definitions of *Homeownership, Housing,* and *Low-income families;*
■ g. Revise paragraph (2) of the definition of *Program income;*
■ h. Revise the definitions of *Project completion, Reconstruction, Single room occupancy (SRO) housing,* and *Subrecipient;*
■ i. Add, in alphabetical order, a definition of *Uniform Physical Condition Standards (UPCS);* and
■ j. Revise the definition of *Very low-income families.*

§ 92.2 Definitions.

The terms *1937 Act, ALJ, Fair Housing Act, HUD, Indian Housing Authority (IHA), Public housing, Public Housing Agency (PHA),* and *Secretary* are defined in 24 CFR 5.100.

* * * * *

CDBG program means the Community Development Block Grant program under 24 CFR part 570.

* * * * *

Commitment means:

(1) The participating jurisdiction has executed a legally binding written agreement (that includes the date of the signature of each person signing the agreement) with a State recipient, a subrecipient, or a contractor to use a specific amount of HOME funds to produce affordable housing, provide downpayment assistance, or provide tenant-based rental assistance; or has met the requirements to commit to a specific local project, as defined in paragraph (2) of this definition. (See § 92.504(c) for minimum requirements for a written agreement.) An agreement between the participating jurisdiction and a subrecipient that is controlled by the participating jurisdiction (e.g., an agency whose officials or employees are official or employees of the participating jurisdiction) does not constitute a commitment. An agreement between the representative unit and a member unit of general local government of a consortium does not constitute a commitment.

(2) *Commit to a specific local project* means:

(i) If the project consists of rehabilitation or new construction (with or without acquisition) the participating jurisdiction (or State recipient or sub recipient) and project owner have executed a written legally binding agreement under which HOME assistance will be provided to the owner for an identifiable project for which all necessary financing has been secured, a budget and schedule have been established, and underwriting has been completed and under which construction is scheduled to start within twelve months of the agreement date. If the project is owned by the participating jurisdiction or State recipient, the project has been set up in the disbursement and information system established by HUD, and construction can reasonably be expected to start within twelve months of the project set-up date.

* * * * *

Community housing development organization * * *

(3) * * *

(ii) The for-profit entity may not have the right to appoint more than one-third of the membership of the organization's governing body. Board members appointed by the for-profit entity may not appoint the remaining two-thirds of the board members;

(iii) The community housing development organization must be free to contract for goods and services from vendors of its own choosing; and

(iv) The officers and employees of the for-profit entity may not be officers or employees of the community housing development organization.

(4) Has a tax exemption ruling from the Internal Revenue Service under section 501(c)(3) or (4) of the Internal Revenue Code of 1986 (26 CFR 1.501(c)(3)–1 or 1.501(c)(4)–1)), is classified as a subordinate of a central organization non-profit under section 905 of the Internal Revenue Code of 1986, or if the private nonprofit organization is an wholly owned entity that is disregarded as an entity separate from its owner for tax purposes (e.g., a single member limited liability company that is wholly owned by an organization that qualifies as tax-exempt), the owner organization has a tax exemption ruling from the Internal Revenue Service under section 501(c)(3) or (4) of the Internal Revenue Code of 1986 and meets the definition of ''community housing development organization;''

(5) Is not a governmental entity (including the participating jurisdiction, other jurisdiction, Indian tribe, public housing authority, Indian housing authority, housing finance agency, or redevelopment authority) and is not controlled by a governmental entity. An organization that is created by a governmental entity may qualify as a community housing development organization; however, the governmental entity may not have the right to appoint more than one-third of the membership of the organization's governing body and no more than one-third of the board members may be public officials or employees of governmental entity. Board members appointed by a governmental entity may not appoint the remaining two-thirds of the board members. The officers or employees of a governmental entity may not be officers or employees of a community housing development organization;

* * * * *

(9) Has a demonstrated capacity for carrying out housing projects assisted with HOME funds. A designated organization undertaking development activities as a developer or sponsor must satisfy this requirement by having paid employees with housing development experience who will work on projects assisted with HOME funds. For its first year of funding as a community housing development organization, an organization may satisfy this requirement through a contract with a consultant who has housing development experience to train appropriate key staff of the organization. An organization that will own housing must demonstrate capacity to act as owner of a project and meet the requirements of § 92.300(a)(2). A nonprofit organization does not meet the test of demonstrated capacity based on any person who is a volunteer or whose services are donated by another organization; and

* * * * *

Consolidated plan means the plan submitted and approved in accordance with 24 CFR part 91.

* * * * *

Homeownership means ownership in fee simple title in a 1- to 4-unit dwelling or in a condominium unit, or equivalent form of ownership approved by HUD.

(1) The land may be owned in fee simple or the homeowner may have a 99-year ground lease.

(i) For housing located in the insular areas, the ground lease must be 40 years or more.

(ii) For housing located on Indian trust or restricted Indian lands or a Community Land Trust, the ground lease must be 50 years or more.

(iii) For manufactured housing, the ground lease must be for a period at least equal to the applicable period of affordability in § 92.254.

(2) Right to possession under a contract for deed, installment contract, or land contract (pursuant to which the deed is not given until the final payment is made) is not an equivalent form of ownership.

(3) The ownership interest may be subject only to the restrictions on resale required under § 92.254(a); mortgages, deeds of trust, or other liens or instruments securing debt on the property as approved by the participating jurisdiction; or any other restrictions or encumbrances that do not impair the good and marketable nature of title to the ownership interest.

(4) The participating jurisdiction must determine whether or not ownership or membership in a cooperative or mutual housing project constitutes homeownership under State law; however, if the cooperative or mutual housing project receives Low Income Housing Tax Credits, the ownership or membership does not constitute homeownership.

* * * * *

Housing includes manufactured housing and manufactured housing lots, permanent housing for disabled homeless persons, transitional housing, single-room occupancy housing, and group homes. Housing also includes elder cottage housing opportunity (ECHO) units that are small, free-standing, barrier-free, energy-efficient, removable, and designed to be installed adjacent to existing single-family dwellings. Housing does not include emergency shelters (including shelters for disaster victims) or facilities such as nursing homes, convalescent homes, hospitals, residential treatment facilities, correctional facilities, halfway houses, housing for students, or dormitories (including farmworker dormitories).

* * * * *

Low-income families means families whose annual incomes do not exceed 80 percent of the median income for the area, as determined by HUD, with adjustments for smaller and larger families, except that HUD may establish income ceilings higher or lower than 80 percent of the median for the area on the basis of HUD findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes. An individual does not qualify as a low-income family if the individual is a student who is not eligible to receive Section 8 assistance under 24 CFR 5.612.

* * * * *

Program income * * *

(2) Gross income from the use or rental of real property, owned by the participating jurisdiction, State recipient, or a subrecipient, that was acquired, rehabilitated, or constructed, with HOME funds or matching contributions, less costs incidental to generation of the income (*Program income* does not include gross income from the use, rental or sale of real property received by the project owner, developer, or sponsor, unless the funds are paid by the project owner, developer, or sponsor to the participating jurisdiction, subrecipient or State recipient);

* * * * *

Project completion means that all necessary title transfer requirements and construction work have been performed; the project complies with the requirements of this part (including the property standards under § 92.251); the final drawdown of HOME funds has been disbursed for the project; and the project completion information has been entered into the disbursement and information system established by HUD, except that with respect to rental housing project completion, for the purposes of § 92.502(d) of this part, project completion occurs upon completion of construction and before occupancy. For tenant-based rental assistance, project completion means the final drawdown has been disbursed for the project.

Reconstruction means the rebuilding, on the same lot, of housing standing on a site at the time of project commitment, except that housing that was destroyed may be rebuilt on the same lot if HOME funds are committed within 12 months of the date of destruction. The number of housing units on the lot may not be decreased or increased as part of a reconstruction project, but the number of rooms per unit may be increased or decreased. Reconstruction also includes replacing an existing substandard unit of manufactured housing with a new or standard unit of manufactured housing. Reconstruction is rehabilitation for purposes of this part.

* * * * *

Single room occupancy (SRO) housing means housing (consisting of single-room dwelling units) that is the primary residence of its occupant or occupants. The unit must contain either food preparation or sanitary facilities (and may contain both) if the project consists of new construction, conversion of nonresidential space, or reconstruction. For acquisition or rehabilitation of an existing residential structure or hotel, neither food preparation nor sanitary facilities are required to be in the unit. If the units do not contain sanitary facilities, the building must contain sanitary facilities that are shared by tenants. A project's designation as an SRO cannot be inconsistent with the building's zoning and building code classification.

* * * * *

Subrecipient means a public agency or nonprofit organization selected by the participating jurisdiction to administer all or some of the participating jurisdiction's HOME programs to produce affordable housing, provide downpayment assistance, or provide tenant-based rental assistance. A public agency or nonprofit organization that receives HOME funds solely as a developer or owner of a housing project is not a subrecipient. The participating jurisdiction's selection of a subrecipient is not subject to the procurement procedures and requirements.

* * * * *

Uniform Physical Condition Standards (UPCS) means uniform national standards established by HUD pursuant to 24 CFR 5.703 for housing that is decent, safe, sanitary, and in good repair. Standards are established for inspectable items for each of the following areas: site, building exterior, building systems, dwelling units, and common areas.

* * * * *

Very low-income families means low-income families whose annual incomes do not exceed 50 percent of the median family income for the area, as determined by HUD with adjustments for smaller and larger families, except that HUD may establish income ceilings higher or lower than 50 percent of the median for the area on the basis of HUD findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes. An individual does not qualify as a very low-income family if the individual is a student who is not eligible to receive Section 8 assistance under 24 CFR 5.612.

■ 6. Add § 92.3 to read as follows:

§ 92.3 Applicability of 2013 regulatory changes.

The regulations of this part, as revised by final rule published on July 24, 2013 are applicable to projects for which HOME funds are committed on or after August 23, 2013, with the exception of the following provisions;

(a) Section 92.2, for the definition of commitment, the change which eliminates reservations of funds that are not project-specific to CHDOs as a commitment will be applicable on October 22, 2013 and will be implemented by HUD for deadlines that occur on or after January 1, 2015;

(b) Section 92.251, Property Standards, will apply to projects to which funds are committed on or after January 24, 2015;

(c) Section 92.254(f). Homebuyer program policies, for written policies related to underwriting, responsible lending, and refinancing, will be applicable on January 24, 2014;

(d) Section 92.500(d)(1)(C), establishing the separate 5-year deadline for expenditure of CHDO set-aside funds will be applicable on January 1, 2015 and will be implemented by HUD for all deadlines that occur on or after that date; and

(e) Section 92.504(a), for written policies, procedures, and systems, will be applicable on July 24, 2014.

(f) Section 92.504(d)(2), for financial oversight of projects assisted with HOME funds, will be applicable on July 24, 2014.

■ 7. In § 92.201, revise paragraph (a)(2) to read as follows:

§ 92.201 Distribution of assistance.

(a) * * *

(2) The participating jurisdiction may only invest its HOME funds in eligible projects within its boundaries, or in jointly funded projects within the boundaries of contiguous local jurisdictions which serve residents from both jurisdictions. For a project to be jointly funded, both jurisdictions must make a financial contribution to the project. A jurisdiction's financial contribution may take the form of a grant or loan (including a loan of funds that comes from other federal sources and that are in the jurisdiction's control, such as CDBG program funds) or relief of a significant tax or fee (such as waiver of impact fees, property taxes, or other taxes or fees customarily imposed on projects within the jurisdiction).

* * * * *

■ 8. In § 92.202, revise paragraph (b) to read as follows:

§ 92.202 Site and neighborhood standards.

* * * * *

(b) *New rental housing.* In carrying out the site and neighborhood requirements with respect to new construction of rental housing, a participating jurisdiction is responsible for making the determination that proposed sites for new construction meet the requirements in 24 CFR 983.57(e)(2) and (3).

■ 9. In § 92.203, revise paragraphs (a)(1)(i), (a)(2), (b), (c), and (d)(1) to read as follows:

§ 92.203 Income determinations.

(a) * * *

(1) * * *

(i) Examine at least 2 months of source documents evidencing annual income (e.g., wage statement, interest statement, unemployment compensation statement) for the family.

* * * * *

(2) For all other families (i.e., homeowners receiving rehabilitation assistance, homebuyers, and recipients of HOME tenant-based rental assistance), the participating jurisdiction must determine annual income by examining at least 2 months of source documents evidencing annual income (e.g., wage statement, interest statement, unemployment compensation statement) for the family.

(b) When determining whether a family is income eligible, the participating jurisdiction must use one of the following two definitions of ''annual income'':

(1) Annual income as defined at 24 CFR 5.609 (except when determining the income of a homeowner for an owner-occupied rehabilitation project, the value of the homeowner's principal residence may be excluded from the calculation of Net Family Assets, as defined in 24 CFR 5.603); or

(2) Adjusted gross income as defined for purposes of reporting under Internal Revenue Service Form 1040 series for individual Federal annual income tax purposes.

(c) Although the participating jurisdiction may use either of the definitions of ''annual income'' permitted in paragraph (b) of this section to calculate adjusted income, it must apply exclusions from income established at 24 CFR 5.611. The HOME rents for very low-income families established under § 92.252(b)(2) are based on adjusted income. In addition, the participating jurisdiction may base the amount of tenant-based rental assistance on the adjusted income of the family. The participating jurisdiction may use only one definition for each HOME-assisted program (e.g., downpayment assistance program) that it administers and for each rental housing project.

(d)(1) The participating jurisdiction must calculate the annual income of the family by projecting the prevailing rate of income of the family at the time the participating jurisdiction determines that the family is income eligible. Annual income shall include income from all persons in the household. Income or asset enhancement derived from the HOME-assisted project shall not be considered in calculating annual income.

* * * * *

■ 10. In § 92.205, revise paragraphs (a)(1), (a)(2), (b)(1), (d), and (e) to read as follows:

§ 92.205 Eligible activities: General.

(a) * * *

(1) HOME funds may be used by a participating jurisdiction to provide incentives to develop and support affordable rental housing and homeownership affordability through the acquisition (including assistance to homebuyers), new construction, reconstruction, or rehabilitation of nonluxury housing with suitable amenities, including real property acquisition, site improvements, conversion, demolition, and other expenses, including financing costs, relocation expenses of any displaced persons, families, businesses, or organizations; to provide tenant-based rental assistance, including security deposits; to provide payment of reasonable administrative and planning costs; and to provide for the payment of operating expenses of community housing development organizations. The housing must be permanent or transitional housing. The specific eligible costs for these activities are set forth in §§ 92.206 through 92.209. The activities and costs are eligible only if the housing meets the property standards in § 92.251 upon project completion.

(2) Acquisition of vacant land or demolition must be undertaken only with respect to a particular housing project intended to provide affordable housing within the time frames established in paragraph (2) of the definition of ''commitment'' in § 92.2.

* * * * *

(b) * * *

(1) A participating jurisdiction may invest HOME funds as equity investments, interest-bearing loans or advances, non-interest-bearing loans or advances, interest subsidies consistent with the purposes of this part, deferred payment loans, grants, or other forms of assistance that HUD determines to be consistent with the purposes of this part and specifically approves in writing. Each participating jurisdiction has the right to establish the terms of assistance, subject to the requirements of this part.

* * * * *

(d) *Multi-unit projects.* HOME funds may be used to assist one or more housing units in a multi-unit project.

(1) Only the actual HOME eligible development costs of the assisted units may be charged to the HOME program. If the assisted and nonassisted units are not comparable, the actual costs may be determined based on a method of cost allocation. If the assisted and non-assisted units are comparable in terms of size, features, and number of bedrooms, the actual cost of the HOME-assisted units can be determined by prorating the total HOME eligible development costs of the project so that the proportion of the total development costs charged to the HOME program does not exceed the proportion of the HOME-assisted units in the project.

(2) After project completion, the number of units designated as HOME-assisted may be reduced only in accordance with § 92.210, except that in a project consisting of all HOME-assisted units, one unit may be subsequently converted to an on-site manager's unit if the participating jurisdiction determines that the conversion will contribute to the stability or effectiveness of the housing and that, notwithstanding the loss of one HOME-assisted unit, the costs charged to the HOME program do not exceed the actual costs of the HOME-assisted units and do not exceed the subsidy limit in § 92.250(b).

(e) *Terminated projects.* A HOME assisted project that is terminated before completion, either voluntarily or involuntarily, constitutes an ineligible activity, and the participating jurisdiction must repay any HOME funds invested in the project to the participating jurisdiction's HOME Investment Trust Fund in accordance with § 92.503(b) (except for project-specific assistance to community housing development organizations as provided in § 92.301(a)(3) and (b)(3)).

(1) A project that does not meet the requirements for affordable housing must be terminated and the participating jurisdiction must repay all HOME funds invested in the project to the participating jurisdiction's HOME Investment Trust Fund in accordance with § 92.503(b).

(2) If a participating jurisdiction does not complete a project within 4 years of the date of commitment of funds, the project is considered to be terminated and the participating jurisdiction must repay all funds invested in the project to the participating jurisdiction's HOME Investment Trust Fund in accordance with § 92.503(b). The participating jurisdiction may request a one-year extension of this deadline in writing, by submitting information about the status of the project, steps being taken to overcome any obstacles to completion, proof of adequate funding to complete the project, and a schedule with milestones for completion of the project for HUD's review and approval.

■ 11. In § 92.206, revise paragraphs (a)(1), (a)(2), (a)(3) introductory text, (a)(4), (b) introductory text, (b)(1), (b)(2) introductory text, (b)(2)(vi), (d)(1), (d)(3), and (d)(6) to read as follows:

§ 92.206 Eligible project costs.

* * * * *

(a) * * *

(1) For new construction projects, costs to meet the new construction standards in § 92.251;

(2) For rehabilitation, costs to meet the property standards for rehabilitation projects in § 92.251;

(3) For both new construction and rehabilitation projects, costs:

* * * * *

(4) For both new construction and rehabilitation of multifamily rental housing projects, costs to construct or rehabilitate laundry and community facilities that are located within the same building as the housing and which are for the use of the project residents and their guests.

* * * * *

(b) *Refinancing costs.* The cost to refinance existing debt secured by a housing project that is being rehabilitated with HOME funds. These costs include the following:

(1) For single-family (one- to four-family) owner-occupied housing, when loaning HOME funds to rehabilitate the housing, if the refinancing is necessary to reduce the overall housing costs to the borrower and make the housing more affordable and if the rehabilitation

cost is greater than the amount of debt that is refinanced.

(2) For single family or multifamily projects, when loaning HOME funds to rehabilitate the units if refinancing is necessary to permit or continue affordability under § 92.252. The participating jurisdiction must establish refinancing guidelines and state them in its consolidated plan described in 24 CFR part 91. Regardless of the amount of HOME funds invested, the minimum affordability period shall be 15 years. The guidelines shall describe the conditions under which the participating jurisdictions will refinance existing debt. At minimum, the guidelines must:

* * * * *

(vi) State that HOME funds cannot be used to refinance single family or multifamily housing loans made or insured by any Federal program, including CDBG.

* * * * *

(d) * * *

(1) Architectural, engineering, or related professional services required to prepare plans, drawings, specifications, or work write-ups. The costs may be paid if they were incurred not more than 24 months before the date that HOME funds are committed to the project and the participating jurisdiction expressly permits HOME funds to be used to pay the costs in the written agreement committing the funds.

* * * * *

(3) Costs of a project audit, including certification of costs performed by a certified public accountant, that the participating jurisdiction may require with respect to the development of the project.

* * * * *

(6) Staff and overhead costs of the participating jurisdiction directly related to carrying out the project, such as work specifications preparation, loan processing inspections, and other services related to assisting potential owners, tenants, and homebuyers, e.g., housing counseling, may be charged to project costs only if the project is funded and the individual becomes the owner or tenant of the HOME-assisted project. For multi-unit projects, such costs must be allocated among HOME-assisted units in a reasonable manner and documented. Although these costs may be charged as project costs, these costs (except housing counseling) cannot be charged to or paid by low-income families.

* * * * *

■ 12. In § 92.207, revise paragraph (b) to read as follows:

§ 92.207 Eligible administrative and planning costs.

* * * * *

(b) *Staff and overhead.* Staff and overhead costs of the participating jurisdiction directly related to carrying out the project, such as work specifications preparation, loan processing, inspections, lead-based paint evaluations (visual assessments, inspections, and risk assessments) and other services related to assisting potential owners, tenants, and homebuyers (e.g., housing counseling); and staff and overhead costs directly related to providing advisory and other relocation services to persons displaced by the project, including timely written notices to occupants, referrals to comparable and suitable replacement property, property inspections, counseling, and other assistance necessary to minimize hardship. These costs may be charged as administrative costs or as project costs under § 92.206(d)(6) and (f)(2), at the discretion of the participating jurisdiction; however, these costs (except housing counseling) cannot be charged to or paid by the low-income families.

* * * * *

■ 13. In § 92.208, revise paragraph (a) to read as follows:

§ 92.208 Eligible community housing development organization (CHDO) operating expense and capacity building costs.

(a) Up to 5 percent of a participating jurisdiction's fiscal year HOME allocation may be used for the operating expenses of community housing development organizations (CHDOs). This amount is in addition to amounts set aside for housing projects that are owned, developed, or sponsored by CHDOs as described in § 92.300(a). These funds may not be used to pay operating expenses incurred by a CHDO acting as a subrecipient or contractor under the HOME Program. Operating expenses means reasonable and necessary costs for the operation of the community housing development organization. Such costs include salaries, wages, and other employee compensation and benefits; employee education, training, and travel; rent; utilities; communication costs; taxes; insurance; equipment; materials; and supplies. The requirements and limitations on the receipt of these funds by CHDOs are set forth in § 92.300(e) and (f).

* * * * *

■ 14. In § 92.209, revise paragraphs (a), (c) introductory text, (c)(2), (g), (h)(3)(ii), and (l) to read as follows:

§ 92.209 Tenant-based rental assistance: Eligible costs and requirements.

(a) *Eligible costs.* Eligible costs are the rental assistance and security deposit payments made to provide tenant-based rental assistance for a family pursuant to this section. Eligible costs also include utility deposit assistance, but only if this assistance is provided with tenant-based rental assistance or security deposit payment. Administration of tenant-based rental assistance is eligible only under general management oversight and coordination at § 92.207(a), except that the costs of inspecting the housing and determining the income eligibility of the family are eligible as costs of the tenant-based rental assistance.

* * * * *

(c) *Tenant selection.* The participating jurisdiction must select low-income families in accordance with written tenant selection policies and criteria that are based on local housing needs and priorities established in the participating jurisdiction's consolidated plan.

* * * * *

(2) *Targeted assistance.* (i) The participating jurisdiction may establish a preference for individuals with special needs (e.g., homeless persons or elderly persons) or persons with disabilities. The participating jurisdiction may offer, in conjunction with a tenant-based rental assistance program, particular types of nonmandatory services that may be most appropriate for persons with a special need or a particular disability. Generally, tenant-based rental assistance and the related services should be made available to all persons with special needs or disabilities who can benefit from such services. Participation may be limited to persons with a specific disability if necessary to provide as effective housing, aid, benefit, or services as those provided to others in accordance with 24 CFR 8.4(b)(1)(iv).

(ii) The participating jurisdiction may also provide a preference for a specific category of individuals with disabilities (e.g., persons with HIV/AIDS or chronic mental illness) if the specific category is identified in the participating jurisdiction's consolidated plan as having unmet need and the preference is needed to narrow the gap in benefits and services received by such persons.

(iii) *Self-sufficiency program.* The participating jurisdiction may require the family to participate in a self-sufficiency program as a condition of selection for assistance. The family's failure to continue participation in the self-sufficiency program is not a basis for terminating the assistance; however, renewal of the assistance may be conditioned on participation in the program. Tenants living in a HOME-assisted rental project who receive tenant-based rental assistance as relocation assistance must not be required to participate in a self-sufficiency program as a condition of receiving assistance.

(iv) *Homebuyer program.* HOME tenant-based rental assistance may assist a tenant who has been identified as a potential low-income homebuyer through a lease-purchase agreement, with monthly rental payments for a period up to 36 months (i.e., 24 months, with a 12-month renewal in accordance with paragraph (e) of this section). The HOME tenant-based rental assistance payment may not be used to accumulate a downpayment or closing costs for the purchase; however, all or a portion of the homebuyer-tenant's monthly contribution toward rent may be set aside for this purpose. If a participating jurisdiction determines that the tenant has met the lease-purchase criteria and is ready to assume ownership, HOME funds may be provided for downpayment assistance in accordance with the requirements of this part.

(v) Preferences cannot be administered in a manner that limits the opportunities of persons on any basis prohibited by the laws listed under 24 CFR 5.105(a). For example, a participating jurisdiction may not determine that persons given a preference under the program are therefore prohibited from applying for or participating in other programs or forms of assistance. Persons who are eligible for a preference must have the opportunity to participate in all programs of the participating jurisdiction, including programs that are not separate or different.

* * * * *

(g) *Tenant protections.* The tenant must have a lease that complies with the requirements in § 92.253 (a) and (b).

(h) * * *

(3) * * *

(ii) The Section 8 Housing Choice Voucher Program (24 CFR part 982).

* * * * *

(l) *Use of Section 8 assistance.* In any case where assistance under section 8 of the 1937 Act becomes available, recipients of tenant-based rental assistance under this part will qualify for tenant selection preferences to the same extent as when they received the HOME tenant-based rental assistance under this part.

■ 15. Add § 92.210 to read as follows:

§ 92.210 Troubled HOME-assisted rental housing projects.

(a) The provisions of this section apply only to an existing HOME-assisted rental project that, within the HOME period of affordability, is no longer financially viable. For purposes of this section, a HOME assisted rental project is no longer financially viable if its operating costs significantly exceed its operating revenue. HUD may approve one or both of the actions described in paragraphs (b) and (c) of this section to strategically preserve a rental project after consideration of market needs, available resources, and the likelihood of long-term viability of the project.

(b) Notwithstanding § 92.214, a participating jurisdiction may request and HUD may permit, pursuant to a written memorandum of agreement, a participating jurisdiction to invest additional HOME funds in the existing HOME-assisted rental project. The total HOME funding for the project (original investment plus additional investment) must not exceed the per-unit subsidy limit in § 92.250(a). The use of HOME funds may include, but is not limited to, rehabilitation of the HOME units and recapitalization of project reserves for the HOME units (to fund capital costs). If additional HOME funds are invested, HUD may require the period of affordability to be extended, based on such considerations as the amount of additional HOME funds or additional units.

(c) HUD Headquarters may, through written approval, permit the participating jurisdiction to reduce the number of HOME-assisted units, if the project contains more than the minimum number of units required to be designated as HOME-assisted under § 92.205(d). In determining whether to permit a reduction in the number of HOME-assisted units, HUD will take into account the required period of affordability and the amount of HOME assistance provided to the project.

■ 16. Add § 92.213 to read as follows:

§ 92.213 HOME Funds and Public Housing.

(a) *General rule.* HOME funds may not be used for public housing units. HOME-assisted housing units may not receive Operating Fund or Capital Fund assistance under section 9 of the 1937 Act during the HOME period of affordability.

(b) *Exception.* HOME funds may be used for the development of public housing units, if the units are developed under section 24 of the 1937 Act (HOPE VI) and no Capital Fund assistance under section 9(d) of the Act is used for the development of the unit. Units developed with both HOME and HOPE VI may receive operating assistance under section 9 of the 1937 Act. Units developed with HOME and HOPE VI funds under this paragraph may subsequently receive Capital Funds for rehabilitation or modernization.

(c) *Using HOME funds in public housing projects.* Consistent with § 92.205(d), HOME funds may be used for affordable housing units in a project that also contains public housing units, provided that the HOME funds are not used for the public housing units (except as provided in paragraph (b) of this section) and HOME funds are used only for eligible costs in accordance with this part.

(d) The HOME funds must be used in accordance with the requirements of this part and the project must meet the requirements of this part, including rent requirements in § 92.252.

■ 17. In § 92.214, revise the section heading and paragraphs (a)(4) and (b) to read as follows:

§ 92.214 Prohibited activities and fees.

(a) * * *

(4) Provide assistance for uses authorized under section 9 of the 1937 Act (Public Housing Capital and Operating Funds);

* * * * *

(b)(1) Participating jurisdictions may not charge (and must prohibit State recipients, subrecipients, and community housing development organizations from charging) servicing, origination, or other fees for the purpose of covering costs of administering the HOME program (e.g., fees on low-income families for construction management or for inspections for compliance with property standards) (see § 92.206(d)(6) and § 92.207), except that:

(i) Participating jurisdictions and State recipients may charge owners of rental projects reasonable annual fees for compliance monitoring during the period of affordability. The fees must be based upon the average actual cost of performing the monitoring of HOME-assisted rental projects. The basis for determining the amount of for the fee amount must be documented and the fee must be included in the costs of the project as part of the project underwriting;

(ii) Participating jurisdictions, subrecipients and State recipients may charge nominal application fees (although these fees are not an eligible

HOME cost) to project owners to discourage frivolous applications. The amount of application fees must be appropriate to the type of application and may not create an undue impediment to a low-income family's, subrecipient's, State recipient's, or other entity's participation in the participating jurisdiction's program; and

(iii) Participating jurisdictions, subrecipients and State recipients may charge homebuyers a fee for housing counseling.

(2) All fees charged under paragraph (b)(1) of this section are applicable credits under 2 CFR part 225 (OMB Circular A–87, entitled ''Cost Principles for State, Local, and Indian Tribal Governments'').

(3) The participating jurisdiction must prohibit project owners from charging fees that are not customarily charged in rental housing (e.g., laundry room access fees), except that rental project owners may charge:

(i) Reasonable application fees to prospective tenants;

(ii) Parking fees to tenants only if such fees are customary for rental housing projects in the neighborhood; and

(iii) Fees for services such as bus transportation or meals, as long as the services are voluntary and fees are charged for services provided.

■ 18. In § 92.221, add paragraph (d) to read as follows:

§ 92.221 Match credit.

* * * * *

(d) Match credit for the development of affordable homeownership housing for sale to homebuyers. Contributions to the development of homeownership housing may be credited as a match only to the extent that the sales price of the housing is reduced by the amount of the contribution or, if the development costs exceed the fair market value of the housing, the contribution may be credited to the extent that the contributions enable the housing to be sold for less than the cost of development.

■ 19. In § 92.222, revise paragraph (b) to read as follows:

§ 92.222 Reduction of matching contribution requirement.

* * * * *

(b) Reduction of match for participating jurisdictions in disaster areas. If a participating jurisdiction is located in an area in which a declaration of major disaster is made pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121–5206), the participating jurisdiction may request a reduction of its matching requirement.

(1) In determining whether to grant the request and the amount and duration of the reduction, if any, HUD must consider the fiscal impact of the disaster on the participating jurisdiction.

(i) For a local participating jurisdiction, the HUD Field office may reduce the matching requirement specified in § 92.218 by up to 100 percent for the fiscal year in which the declaration of major disaster is made and the following fiscal year.

(ii) For a State participating jurisdiction, the HUD Field office may reduce the matching requirement specified in § 92.218, by up to 100 percent for the fiscal year in which the declaration of major disaster is made and the following fiscal year with respect to any HOME funds expended in an area to which the declaration of a major disaster applies.

(2) At its discretion and upon request of the participating jurisdiction, the HUD Field Office may extend the reduction for an additional year.

■ 20. Revise § 92.250 to read as follows:

§ 92.250 Maximum per-unit subsidy amount, underwriting, and subsidy layering.

(a) *Maximum per-unit subsidy amount.* The total amount of HOME funds and ADDI funds that a participating jurisdiction may invest on a per-unit basis in affordable housing may not exceed the per-unit dollar limitations established under section 221(d)(3)(ii) of the National Housing Act (12 U.S.C.17151(d)(3)(ii)) for elevator-type projects that apply to the area in which the housing is located. HUD will allow the per-unit subsidy amount to be increased on a program-wide basis to an amount, up to 240 percent of the original per unit limits, to the extent that the costs of multifamily housing construction exceed the section 221(d)(3)(ii) limit.

(b) *Underwriting and subsidy layering.* Before committing funds to a project, the participating jurisdiction must evaluate the project in accordance with guidelines that it has adopted for determining a reasonable level of profit or return on owner's or developer's investment in a project and must not invest any more HOME funds, alone or in combination with other governmental assistance, than is necessary to provide quality affordable housing that is financially viable for a reasonable period (at minimum, the period of affordability in § 92.252 or § 92.254) and that will not provide a profit or return on the owner's or developer's investment that exceeds the participating jurisdiction's established standards for the size, type, and complexity of the project. The participating jurisdiction's guidelines must require the participating jurisdiction to undertake:

(1) An examination of the sources and uses of funds for the project and a determination that the costs are reasonable; and

(2) An assessment, at minimum, of the current market demand in the neighborhood in which the project will be located, the experience of the developer, the financial capacity of the developer, and firm written financial commitments for the project.

(3) For projects involving rehabilitation of owner-occupied housing pursuant to § 92.254(b):

(i) An underwriting analysis is required only if the HOME-funded rehabilitation loan is an amortizing loan; and

(ii) A market analysis or evaluation of developer capacity is not required.

(4) For projects involving HOME-funded downpayment assistance pursuant to § 92.254(a) and which do not include HOME-funded development activity, a market analysis or evaluation of developer capacity is not required.

■ 21. Revise § 92.251 to read as follows:

§ 92.251 Property standards.

(a) *New construction projects.* (1) *State and local codes, ordinances, and zoning requirements.* Housing that is newly constructed with HOME funds must meet all applicable State and local codes, ordinances, and zoning requirements. HOME-assisted new construction projects must meet State or local residential and building codes, as applicable or, in the absence of a State or local building code, the International Residential Code or International Building Code (as applicable to the type of housing) of the International Code Council. The housing must meet the applicable requirements upon project completion.

(2) *HUD requirements.* All new construction projects must also meet the requirements described in paragraphs (a)(2)(i) through (v) of this section:

(i) *Accessibility.* The housing must meet the accessibility requirements of 24 CFR part 8, which implements Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and Titles II and III of the Americans with Disabilities Act (42 U.S.C. 12131–12189) implemented at 28 CFR parts 35 and 36, as applicable. Covered multifamily dwellings, as defined at 24 CFR 100.201, must also meet the design and construction requirements at 24 CFR

100.205, which implements the Fair Housing Act (42 U.S.C. 3601–3619).

(ii) [Reserved]

(iii) *Disaster mitigation.* Where relevant, the housing must be constructed to mitigate the impact of potential disasters (e.g., earthquakes, hurricanes, flooding, and wildfires), in accordance with State and local codes, ordinances, or other State and local requirements, or such other requirements as HUD may establish.

(iv) *Written cost estimates, construction contracts and construction documents.* The participating jurisdiction must ensure the construction contract(s) and construction documents describe the work to be undertaken in adequate detail so that inspections can be conducted. The participating jurisdiction must review and approve written cost estimates for construction and determining that costs are reasonable.

(v) *Construction progress inspections.* The participating jurisdiction must conduct progress and final inspections of construction to ensure that work is done in accordance with the applicable codes, the construction contract, and construction documents.

(b) *Rehabilitation projects.* All rehabilitation that is performed using HOME funds must meet the requirements of this paragraph (b).

(1) *Rehabilitation standards.* The participating jurisdiction must establish rehabilitation standards for all HOME-assisted housing rehabilitation activities that set forth the requirements that the housing must meet upon project completion. The participating jurisdiction's description of its standards must be in sufficient detail to determine the required rehabilitation work including methods and materials. The standards may refer to applicable codes or they may establish requirements that exceed the minimum requirements of the codes. The rehabilitation standards must address each of the following:

(i) *Health and safety.* The participating jurisdiction's standards must identify life-threatening deficiencies that must be addressed immediately if the housing is occupied.

(ii) *Major systems.* Major systems are: structural support; roofing; cladding and weatherproofing (e.g., windows, doors, siding, gutters); plumbing; electrical; and heating, ventilation, and air conditioning. For rental housing, the participating jurisdiction's standards must require the participating jurisdiction to estimate (based on age and condition) the remaining useful life of these systems, upon project completion of each major systems. For multifamily housing projects of 26 units or more, the participating jurisdiction's standards must require the participating jurisdiction to determine the useful life of major systems through a capital needs assessment of the project. For rental housing, if the remaining useful life of one or more major system is less than the applicable period of affordability, the participating jurisdiction's standards must require the participating jurisdiction to ensure that a replacement reserve is established and monthly payments are made to the reserve that are adequate to repair or replace the systems as needed. For homeownership housing, the participating jurisdiction's standards must require, upon project completion, each of the major systems to have a remaining useful life for a minimum of 5 years or for such longer period specified by the participating jurisdiction, or the major systems must be rehabilitated or replaced as part of the rehabilitation work.

(iii) *Lead-based paint.* The participating jurisdiction's standards must require the housing to meet the lead-based paint requirements at 24 CFR part 35.

(iv) *Accessibility.* The participating jurisdiction's standards must require the housing to meet the accessibility requirements in 24 CFR part 8, which implements Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and Titles II and III of the Americans with Disabilities Act (42 U.S.C. 12131–12189) implemented at 28 CFR parts 35 and 36, as applicable. Covered multifamily dwellings, as defined at 24 CFR 100.201, must also meet the design and construction requirements at 24 CFR 100.205, which implements the Fair Housing Act (42 U.S.C. 3601–3619). Rehabilitation may include improvements that are not required by regulation or statute that permit use by a person with disabilities.

(v) [Reserved]

(vi) *Disaster mitigation.* Where relevant, the participating jurisdiction's standards must require the housing to be improved to mitigate the impact of potential disasters (e.g., earthquake, hurricanes, flooding, and wildfires) in accordance with State and local codes, ordinances, and requirements.

(vii) *State and local codes, ordinances, and zoning requirements.* The participating jurisdiction's standards must require the housing to meet all applicable State and local codes, ordinances, and requirements or, in the absence of a State or local building code, the International Existing Building Code of the International Code Council.

(viii) *Uniform Physical Condition Standards.* The standards of the participating jurisdiction must be such that, upon completion, the HOME-assisted project and units will be decent, safe, sanitary, and in good repair as described in 24 CFR 5.703. HUD will establish the minimum deficiencies that must be corrected under the participating jurisdiction's rehabilitation standards based on inspectable items and inspected areas from HUD-prescribed physical inspection procedures (Uniform Physical Conditions Standards) pursuant to 24 CFR 5.705.

(ix) *Capital Needs Assessments.* For multifamily rental housing projects of 26 or more total units, the participating jurisdiction must determine all work that will be performed in the rehabilitation of the housing and the long-term physical needs of the project through a capital needs assessment of the project.

(2) *Construction documents and cost estimates.* The participating jurisdiction must ensure that the work to be undertaken will meet the participating jurisdiction's rehabilitation standards. The construction documents (i.e., written scope of work to be performed) must be in sufficient detail to establish the basis for a uniform inspection of the housing to determine compliance with the participating jurisdiction's standards. The participating jurisdiction must review and approve a written cost estimate for rehabilitation after determining that costs are reasonable.

(3) *Frequency of inspections.* The participating jurisdiction must conduct an initial property inspection to identify the deficiencies that must be addressed. The participating jurisdiction must conduct progress and final inspections to determine that work was done in accordance with work write-ups.

(c) *Acquisition of standard housing.* (1) Existing housing that is acquired with HOME assistance for rental housing, and that was newly constructed or rehabilitated less than 12 months before the date of commitment of HOME funds, must meet the property standards of paragraph (a) or paragraph (b) of this section, as applicable, of this section for new construction and rehabilitation projects. The participating jurisdiction must document this compliance based upon a review of approved building plans and Certificates of Occupancy, and an inspection that is conducted no earlier than 90 days before the commitment of HOME assistance.

(2) All other existing housing that is acquired with HOME assistance for rental housing must meet the

rehabilitation property standards requirements of paragraph (b) of this section. The participating jurisdiction must document this compliance based upon an inspection that is conducted no earlier than 90 days before the commitment of HOME assistance. If the property does not meet these standards, HOME funds cannot be used to acquire the property unless it is rehabilitated to meet the standards of paragraph (b) of this section.

(3) Existing housing that is acquired for homeownership (e.g., downpayment assistance) must be decent, safe, sanitary, and in good repair. The participating jurisdiction must establish standards to determine that the housing is decent, safe, sanitary, and in good repair. At minimum, the standards must provide that the housing meets all applicable State and local housing quality standards and code requirements and the housing does not contain the specific deficiencies proscribed by HUD based on the applicable inspectable items and inspected areas in HUD-prescribed physical inspection procedures (Uniform Physical Condition Standards) issued pursuant to 24 CFR 5.705. The participating jurisdiction must inspect the housing and document this compliance based upon an inspection that is conducted no earlier than 90 days before the commitment of HOME assistance. If the housing does not meet these standards, the housing must be rehabilitated to meet the standards of this paragraph (c)(3) or it cannot be acquired with HOME funds.

(d) *Occupied housing by tenants receiving HOME tenant-based rental assistance.* All housing occupied by tenants receiving HOME tenant-based rental assistance must meet the standards in 24 CFR 982.401, or the successor requirements as established by HUD.

(e) *Manufactured housing.* Construction of all manufactured housing including manufactured housing that replaces an existing substandard unit under the definition of ''reconstruction'' must meet the Manufactured Home Construction and Safety Standards codified at 24 CFR part 3280. These standards preempt State and local codes which are not identical to the federal standards for the new construction of manufactured housing. Participating jurisdictions providing HOME funds to assist manufactured housing units must comply with applicable State and local laws or codes. In the absence of such laws or codes, the installation must comply with the manufacturer's written instructions for installation of manufactured housing units. All new manufactured housing and all manufactured housing that replaces an existing substandard unit under the definition of ''reconstruction'' must be on a permanent foundation that meets the requirements for foundation systems as set forth in 24 CFR 203.43f(c)(i). All new manufactured housing and all manufactured housing that replaces an existing substandard unit under the definition of ''reconstruction'' must, at the time of project completion, be connected to permanent utility hook-ups and be located on land that is owned by the manufactured housing unit owner or land for which the manufactured housing owner has a lease for a period at least equal to the applicable period of affordability. In HOME-funded rehabilitation of existing manufactured housing the foundation and anchoring must meet all applicable State and local codes, ordinances, and requirements or in the absence of local or state codes, the Model Manufactured Home Installation Standards at 24 CFR part 3285. Manufactured housing that is rehabilitated using HOME funds must meet the property standards requirements in paragraph (b) of this section, as applicable. The participating jurisdiction must document this compliance in accordance with inspection procedures that the participating jurisdiction has established pursuant to § 92.251, as applicable.

(f) *Ongoing property condition standards: Rental housing.* (1) Ongoing property standards. The participating jurisdiction must establish property standards for rental housing (including manufactured housing) that apply throughout the affordability period. The standards must ensure that owners maintain the housing as decent, safe, and sanitary housing in good repair. The participating jurisdiction's description of its property standards must be in sufficient detail to establish the basis for a uniform inspection of HOME rental projects. The participating jurisdiction's ongoing property standards must address each of the following:

(i) *Compliance with State and local codes, ordinances, and requirements.* The participating jurisdiction's standards must require the housing to meet all applicable State and local code requirements and ordinances. In the absence of existing applicable State or local code requirements and ordinances, at a minimum, the participating jurisdiction's ongoing property standards must include all inspectable items and inspectable areas specified by HUD based on the HUD physical inspection procedures (Uniform Physical Condition Standards (UPCS)) prescribed by HUD pursuant to 24 CFR 5.705. The participating jurisdiction's property standards are not required to use any scoring, item weight, or level of criticality used in UPCS.

(ii) *Health and safety.* The participating jurisdiction's standards must require the housing to be free of all health and safety defects. The standards must identify life-threatening deficiencies that the owner must immediately correct and the time frames for addressing these deficiencies.

(iii) *Lead-based paint.* The participating jurisdiction's standards must require the housing to meet the lead-based paint requirements in 24 CFR part 35.

(2) Projects to which HOME funds were committed before January 24, 2015 must meet all applicable State or local housing quality standards or code requirements, and if there are no such standard or code requirements, the housing must meet the housing quality standards in 24 CFR 982.401.

(3) *Inspections.* The participating jurisdiction must undertake ongoing property inspections, in accordance with § 92.504(d).

(4) *Corrective and remedial actions.* The participating jurisdiction must have procedures for ensuring that timely corrective and remedial actions are taken by the project owner to address identified deficiencies.

(5) *Inspection procedures.* The participating jurisdiction must establish written inspection procedures inspections. The procedures must include detailed inspection checklists, description of how and by whom inspections will be carried out, and procedures for training and certifying qualified inspectors. The procedures must also describe how frequently the property will be inspected, consistent with this section, § 92.209, and § 92.504(d).

■ 22. In § 92.252:

■ a. Revise the introductory text, paragraph (a) introductory text, paragraph (b) introductory text, paragraphs (c), (d), (e), (f)(2), paragraph (g) heading, and paragraph (j); and

■ b. Add paragraphs (k) and (l).

The revisions and additions read as follows:

§ 92.252 Qualification as affordable housing: Rental housing.

The HOME-assisted units in a rental housing project must be occupied by households that are eligible as low-income families and must meet the requirements of this section to qualify as affordable housing. If the housing is not occupied by eligible tenants within six months following the date of project completion, HUD will require the participating jurisdiction to submit marketing information and, if appropriate, submit a marketing plan. HUD will require the participating jurisdiction to repay HOME funds invested in any housing unit that has not been rented to eligible tenants 18 months after the date of project completion. The affordability requirements also apply to the HOME-assisted non-owner-occupied units in single-family housing purchased with HOME funds in accordance with § 92.254. The tenant must have a written lease that complies with § 92.253.

(a) *Rent limitation.* HUD provides the following maximum HOME rent limits. The rent limits apply to the rent plus the utilities or the utility allowance. The maximum HOME rents (High HOME Rents) are the lesser of:

* * * * *

(b) *Additional rent limitations (Low HOME Rents).* The participating jurisdiction may designate (in its written agreement with the project owner) more than the minimum HOME units in a rental housing project, regardless of project size, to have Low HOME Rents that meet the requirements of this paragraph (b). In rental projects with five or more HOME-assisted rental units, at least 20 percent of the HOME-assisted units must be occupied by very low-income families and meet one of the following rent requirements:

* * * * *

(c) *Additional rent limitations for SRO projects.* (1) For SRO units that have both sanitary and food preparation facilities, the maximum HOME rent is based on the zero-bedroom fair market rent. The project must meet the requirements of paragraphs (a) and (b) of this section.

(2) For SRO units that have no sanitary or food preparation facilities or only one of the two, the maximum HOME rent is based on 75 percent of the zero-bedroom fair market rent. The project is not required to have low HOME rents in accordance with paragraph (b)(1) or (2) of this section, but must meet the occupancy requirements of paragraph (b) of this section.

(d) *Initial rent schedule and utility allowances.* (1) The participating jurisdiction must establish maximum monthly allowances for utilities and services (excluding telephone) and update the allowances annually. The participating jurisdiction must use the HUD Utility Schedule Model or otherwise determine the utility allowance for the project based on the type of utilities used at the project.

(2) The participating jurisdiction must review and approve rents proposed by the owner for units, subject to the maximum rent limitations in paragraphs (a) or (b) of this section. For all units subject to the maximum rent limitations in paragraphs (a) or (b) of this section for which the tenant is paying utilities and services, the participating jurisdiction must ensure that the rents do not exceed the maximum rent minus the monthly allowances for utilities and services.

(e) *Periods of affordability.* The HOME-assisted units must meet the affordability requirements for not less than the applicable period specified in the following table, beginning after project completion.

(1) The affordability requirements:

(i) Apply without regard to the term of any loan or mortgage, repayment of the HOME investment, or the transfer of ownership;

(ii) Must be imposed by a deed restriction, a covenant running with the land, an agreement restricting the use of the property, or other mechanisms approved by HUD and must give the participating jurisdiction the right to require specific performance (except that the participating jurisdiction may provide that the affordability restrictions may terminate upon foreclosure or transfer in lieu of foreclosure); and

(iii) Must be recorded in accordance with State recordation laws.

(2) The participating jurisdiction may use purchase options, rights of first refusal or other preemptive rights to purchase the housing before foreclosure or deed in lieu of foreclosure in order to preserve affordability.

(3) The affordability restrictions shall be revived according to the original terms if, during the original affordability period, the owner of record before the foreclosure, or deed in lieu of foreclosure, or any entity that includes the former owner or those with whom the former owner has or had family or business ties, obtains an ownership interest in the project or property.

(4) The termination of the restrictions on the project does not terminate the participating jurisdiction's repayment obligation under § 92.503(b).

Rental housing activity	Minimum period of affordability in years
Rehabilitation or acquisition of existing housing per unit amount of HOME funds: Under $15,000	5
$15,000 to $40,000	10
Over $40,000 or rehabilitation involving refinancing	15
New construction or acquisition of newly constructed housing	20

(f) * * *

(2) The participating jurisdiction must provide project owners with information on updated HOME rent limits so that rents may be adjusted (not to exceed the maximum HOME rent limits in paragraph (f)(1) of this section) in accordance with the written agreement between the participating jurisdiction and the owner. Owners must annually provide the participating jurisdiction with information on rents and occupancy of HOME-assisted units to demonstrate compliance with this section. The participating jurisdiction must review rents for compliance and approve or disapprove them every year.

* * * * *

(g) *Adjustment of HOME rent limits for an existing project.* * * *

* * * * *

(j) *Fixed and floating HOME units.* In a project containing HOME-assisted and other units, the participating jurisdiction may designate fixed or floating HOME units. This designation must be made at the time of project commitment in the written agreement between the participating jurisdiction and the owner, and the HOME units must be identified not later than the time of initial unit occupancy. Fixed units remain the same throughout the period of affordability. Floating units are changed to maintain conformity with the requirements of this section during the period of affordability so that the total number of housing units meeting the requirements of this section remains the same, and each substituted unit is comparable in terms of size, features, and number of bedrooms to the originally designated HOME-assisted unit.

(k) *Tenant selection.* The tenants must be selected in accordance with § 92.253(d).

(l) *Ongoing responsibilities.* The participating jurisdiction's responsibilities for on-site inspections and financial oversight of rental projects are set forth in § 92.504(d).

■ 23. In § 92.253:

■ a. Revise the section heading and paragraphs (a), (c), and (d);

■ b. Remove ''and'' from the end of paragraph (b)(7);

■ c. Remove the period from the end of paragraph (b)(8) and add ''; and'' in its place; and

■ d. Add paragraph (b)(9),

The revisions and additions read as follows:

§ 92.253 Tenant protections and selection.

(a) *Lease.* There must be a written lease between the tenant and the owner of rental housing assisted with HOME funds that is for a period of not less than one year, unless by mutual agreement between the tenant and the owner a shorter period is specified.

(b) * * *

(9) *Mandatory supportive services.* Agreement by the tenant (other than a tenant in transitional housing) to accept supportive services that are offered.

(c) *Termination of tenancy.* An owner may not terminate the tenancy or refuse to renew the lease of a tenant of rental housing assisted with HOME funds, except for serious or repeated violation of the terms and conditions of the lease; for violation of applicable Federal, State, or local law; for completion of the tenancy period for transitional housing or failure to follow any required transitional housing supportive services plan; or for other good cause. Good cause does not include an increase in the tenant's income or refusal of the tenant to purchase the housing. To terminate or refuse to renew tenancy, the owner must serve written notice upon the tenant specifying the grounds for the action at least 30 days before the termination of tenancy.

(d) *Tenant selection.* An owner of rental housing assisted with HOME funds must comply with the affirmative marketing requirements established by the participating jurisdiction pursuant to § 92.351(a). The owner must adopt and follow written tenant selection policies and criteria that:

(1) Limit the housing to very low-income and low-income families;

(2) Are reasonably related to the applicants' ability to perform the obligations of the lease (i.e., to pay the rent, not to damage the housing; not to interfere with the rights and quiet enjoyment of other tenants);

(3) Limit eligibility or give a preference to a particular segment of the population if permitted in its written agreement with the participating jurisdiction (and only if the limitation or preference is described in the participating jurisdiction's consolidated plan).

(i) Any limitation or preference must not violate nondiscrimination requirements in § 92.350. A limitation or preference does not violate nondiscrimination requirements if the housing also receives funding from a Federal program that limits eligibility to a particular segment of the population (e.g., the Housing Opportunity for Persons with AIDS program under 24 CFR part 574, the Shelter Plus Care program under 24 CFR part 582, the Supportive Housing program under 24 CFR part 583, supportive housing for the elderly or persons with disabilities under 24 CFR part 891), and the limit or preference is tailored to serve that segment of the population.

(ii) If a project does not receive funding from a Federal program that limits eligibility to a particular segment of the population, the project may have a limitation or preference for persons with disabilities who need services offered at a project only if:

(A) The limitation or preference is limited to the population of families (including individuals) with disabilities that significantly interfere with their ability to obtain and maintain housing;

(B) Such families will not be able to obtain or maintain themselves in housing without appropriate supportive services; and

(C) Such services cannot be provided in a nonsegregated setting. The families must not be required to accept the services offered at the project. In advertising the project, the owner may advertise the project as offering services for a particular type of disability; however, the project must be open to all otherwise eligible persons with disabilities who may benefit from the services provided in the project.

(4) Do not exclude an applicant with a certificate or voucher under the Section 8 Tenant-Based Assistance: Housing Choice Voucher Program (24 CFR part 982) or an applicant participating in a HOME tenant-based rental assistance program because of the status of the prospective tenant as a holder of such certificate, voucher, or comparable HOME tenant-based assistance document.

(5) Provide for the selection of tenants from a written waiting list in the chronological order of their application, insofar as is practicable; and

(6) Give prompt written notification to any rejected applicant of the grounds for any rejection.

■ 24. In § 92.254, revise paragraph (a)(2)(iii), (a)(3), (a)(5) introductory text, (a)(5)(i) introductory text, (a)(5)(ii) introductory text, (b)(2), and (c), and add paragraphs (e) and (f) to read as follows:

§ 92.254 Qualification as affordable housing: Homeownership.

(a) * * *

(2) * * *

(iii) If a participating jurisdiction intends to use HOME funds for homebuyer assistance or for the rehabilitation of owner-occupied single-family properties, the participating jurisdiction must use the HOME affordable homeownership limits provided by HUD for newly constructed housing and for existing housing. HUD will provide limits for affordable newly constructed housing based on 95 percent of the median purchase price for the area using Federal Housing Administration (FHA) single family mortgage program data for newly constructed housing, with a minimum limit based on 95 percent of the U.S. median purchase price for new construction for nonmetropolitan areas. HUD will provide limits for affordable existing housing based on 95 percent of the median purchase price for the area using Federal FHA single family mortgage program data for existing housing data and other appropriate data that are available nation-wide for sales of existing housing, with a minimum limit based on 95 percent of the state-wide nonmetropolitan area median purchase price using this data. In lieu of the limits provided by HUD, the participating jurisdiction may determine 95 percent of the median area purchase price for single family housing in the jurisdiction annually, as follows. The participating jurisdiction must set forth the price for different types of single family housing for the jurisdiction. The participating jurisdiction may determine separate limits for existing housing and newly constructed housing. For housing located outside of metropolitan areas, a State may aggregate sales data from more than one county, if the counties are contiguous and similarly situated. The following information must be included in the annual action plan of the Consolidated Plan submitted to HUD for review and updated in each action plan.

(A) The 95 percent of median area purchase price must be established in accordance with a market analysis that ensured that a sufficient number of recent housing sales are included in the survey.

(B) Sales must cover the requisite number of months based on volume: For 500 or more sales per month, a one-month reporting period; for 250 through 499 sales per month, a 2-month reporting period; for less than 250 sales per month, at least a 3-month reporting period. The data must be listed in ascending order of sales price.

(C) The address of the listed properties must include the location within the participating jurisdiction. Lot, square, and subdivision data may be substituted for the street address.

(D) The housing sales data must reflect all, or nearly all, of the one-family house sales in the entire participating jurisdiction.

(E) To determine the median, take the middle sale on the list if an odd number of sales, and if an even number, take the higher of the middle numbers and consider it the median. After identifying the median sales price, the amount should be multiplied by 0.95 to determine the 95 percent of the median area purchase price.

(3) The housing must be acquired by a homebuyer whose family qualifies as a low-income family, and the housing must be the principal residence of the family throughout the period described in paragraph (a)(4) of this section. If there is no ratified sales contract with an eligible homebuyer for the housing within 9 months of the date of completion of construction or rehabilitation, the housing must be rented to an eligible tenant in accordance with § 92.252. In determining the income eligibility of the family, the participating jurisdiction must include the income of all persons living in the housing. The homebuyer must receive housing counseling.

* * * * *

(5) *Resale and recapture.* The participating jurisdiction must establish the resale or recapture requirements that comply with the standards of this section and set forth the requirements in its consolidated plan. HUD must determine that they are appropriate and must specifically approve them in writing.

(i) *Resale.* Resale requirements must ensure, if the housing does not continue to be the principal residence of the family for the duration of the period of affordability that the housing is made available for subsequent purchase only to a buyer whose family qualifies as a low-income family and will use the property as the family's principal residence. The resale requirement must also ensure that the price at resale provides the original HOME-assisted owner a fair return on investment (including the homeowner's investment and any capital improvement) and ensure that the housing will remain affordable to a reasonable range of low-income homebuyers. The participating jurisdiction must specifically define ''fair return on investment'' and ''affordability to a reasonable range of low-income homebuyers,'' and specifically address how it will make the housing affordable to a low-income homebuyer in the event that the resale price necessary to provide fair return is not affordable to the subsequent buyer. The period of affordability is based on the total amount of HOME funds invested in the housing.

* * * * *

(ii) *Recapture.* Recapture provisions must ensure that the participating jurisdiction recoups all or a portion of the HOME assistance to the homebuyers, if the housing does not continue to be the principal residence of the family for the duration of the period of affordability. The participating jurisdiction may structure its recapture provisions based on its program design and market conditions. The period of affordability is based upon the total amount of HOME funds subject to recapture described in paragraph (a)(5)(ii)(A)(*5*) of this section. Recapture provisions may permit the subsequent homebuyer to assume the HOME assistance (subject to the HOME requirements for the remainder of the period of affordability) if the subsequent homebuyer is low-income, and no additional HOME assistance is provided.

* * * * *

(b) * * *

(2) The housing is the principal residence of an owner whose family qualifies as a low-income family at the time HOME funds are committed to the housing. In determining the income eligibility of the family, the participating jurisdiction must include the income of all persons living in the housing.

(c) *Ownership interest.* The ownership in the housing assisted under this section must meet the definition of ''homeownership'' in § 92.2, except that housing that is rehabilitated pursuant to paragraph (b) of this section may also include inherited property with multiple owners, life estates, living trusts and beneficiary deeds under the following conditions. The participating jurisdiction has the right to establish the terms of assistance.

(1) *Inherited property.* Inherited property with multiple owners: Housing for which title has been passed to several individuals by inheritance, but not all heirs reside in the housing, sharing ownership with other nonresident heirs. (The occupant of the housing has a divided ownership interest.) The participating jurisdiction may assist the owner-occupant if the occupant is low-income, occupies the housing as his or her principal residence, and pays all the costs associated with ownership and maintenance of the housing (e.g., mortgage, taxes, insurance, utilities).

(2) *Life estate.* The person who has the life estate has the right to live in the housing for the remainder of his or her life and does not pay rent. The participating jurisdiction may assist the person holding the life estate if the person is low-income and occupies the housing as his or her principal residence.

(3) *Inter vivos trust, also known as a living trust.* A living trust is created during the lifetime of a person. A living trust is created when the owner of property conveys his or her property to a trust for his or her own benefit or for that of a third party (the beneficiaries). The trust holds legal title and the beneficiary holds equitable title. The person may name him or herself as the beneficiary. The trustee is under a fiduciary responsibility to hold and manage the trust assets for the beneficiary. The participating jurisdiction may assist if all beneficiaries of the trust qualify as a low-income family and occupy the property as their principal residence (except that contingent beneficiaries, who receive no benefit from the trust nor have any control over the trust assets until the beneficiary is deceased, need not be low-income). The trust must be valid and enforceable and ensure that each beneficiary has the legal right to occupy the property for the remainder of his or her life.

(4) *Beneficiary deed.* A beneficiary deed conveys an interest in real property, including any debt secured by a lien on real property, to a grantee beneficiary designated by the owner and that expressly states that the deed is effective on the death of the owner. Upon the death of the owner, the grantee beneficiary receives ownership in the property, subject to all conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges, and other encumbrances made by the owner or to which the owner was subject during the owner's lifetime. The participating jurisdiction may assist if the owner qualifies as low-income and

the owner occupies the property as his or her principal residence.

* * * * *

(e) *Providing homeownership assistance through lenders.* Subject to the requirements of this paragraph (e), the participating jurisdiction may provide homeownership assistance through for-profit or nonprofit lending institutions that provide the first mortgage loan to a low-income family.

(1) The homeownership assistance may be provided only as specified in a written agreement between the participating jurisdiction and the lender. The written agreement must specify the forms and amounts of homeownership assistance that the participating jurisdiction authorizes the lender to provide to families and any conditions that apply to the provision of such homeownership assistance.

(2) Before the lender provides any homeownership assistance to a family, the participating jurisdiction must verify that the family is low-income and must inspect the housing for compliance with the property standards in § 92.251.

(3) No fees (e.g., origination fees or points) may be charged to a family for the HOME homeownership assistance provided pursuant to this paragraph (e), and the participating jurisdiction must determine that the fees and other amounts charged to the family by the lender for the first mortgage financing are reasonable. Reasonable administrative costs may be charged to the HOME program as a project cost. If the participating jurisdiction requires lenders to pay a fee to participate in the HOME program, the fee is program income to the HOME program.

(4) If the nonprofit lender is a subrecipient or contractor that is receiving HOME assistance to determine that the family is eligible for homeownership assistance, but the participating jurisdiction or another entity is making the assistance to the homebuyer (e.g., signing the documents for the loan or the grant), the requirements of paragraphs (e)(2) and (3) of this section are applicable.

(f) *Homebuyer program policies.* The participating jurisdiction must have and follow written policies for:

(1) Underwriting standards for homeownership assistance that evaluate housing debt and overall debt of the family, the appropriateness of the amount of assistance, monthly expenses of the family, assets available to acquire the housing, and financial resources to sustain homeownership;

(2) Responsible lending, and

(3) Refinancing loans to which HOME loans are subordinated to ensure that the terms of the new loan are reasonable.

■ 25. Revise § 92.255 to read as follows:

§ 92.255 Converting rental units to homeownership units for existing tenants.

(a) The participating jurisdiction may permit the owner of HOME-assisted rental units to convert the rental units to homeownership units by selling, donating, or otherwise conveying the units to the existing tenants to enable the tenants to become homeowners in accordance with the requirements of § 92.254. However, refusal by the tenant to purchase the housing does not constitute grounds for eviction or for failure to renew the lease.

(b) If no additional HOME funds are used to enable the tenants to become homeowners, the homeownership units are subject to a minimum period of affordability equal to the remaining affordable period if the units continued as rental units. If additional HOME funds are used to directly assist the tenants to become homeowners, the minimum period of affordability is the affordability period under § 92.254(a)(4), based on the amount of direct homeownership assistance provided.

■ 26. Revise § 92.257 to read as follows:

§ 92.257 Faith-based activities.

(a) *Equal treatment of program participants and program beneficiaries.* (1) *Program participants.* Organizations that are religious or faith-based are eligible, on the same basis as any other organization, to participate in HOME program. Neither the Federal Government nor a State or local government receiving funds under the HOME program shall discriminate against an organization on the basis of the organization's religious character or affiliation. Recipients and subrecipients of program funds shall not, in providing program assistance, discriminate against a program participant or prospective program participant on the basis of religion or religious belief.

(2) *Beneficiaries.* In providing services supported in whole or in part with federal financial assistance, and in their outreach activities related to such services, program participants shall not discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

(b) *Separation of explicitly religious activities.* Recipients and subrecipients of HOME program funds that engage in explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization, must perform such activities and offer such services outside of programs that are supported with federal financial assistance separately, in time or location, from the programs or services funded under this part, and participation in any such explicitly religious activities must be voluntary for the program beneficiaries of the HUD-funded programs or services.

(c) *Religious identity.* A faith-based organization that is a recipient or subrecipient of HOME program funds is eligible to use such funds as provided under the regulations of this part without impairing its independence, autonomy, expression of religious beliefs, or religious character. Such organization will retain its independence from federal, State, and local government, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct program funds to support or engage in any explicitly religious activities, including activities that involve overt religious content, such as worship, religious instruction, or proselytization, or any manner prohibited by law. Among other things, faith-based organizations may use space in their facilities to provide program-funded services, without removing or altering religious art, icons, scriptures, or other religious symbols. In addition, a HOME program-funded religious organization retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(d) *Alternative provider.* If a program participant or prospective program participant of the HOME program supported by HUD objects to the religious character of an organization that provides services under the program, that organization shall, within a reasonably prompt time after the objection, undertake reasonable efforts to identify and refer the program participant to an alternative provider to which the prospective program participant has no objection. Except for services provided by telephone, the Internet, or similar means, the referral must be to an alternate provider in reasonable geographic proximity to the organization making the referral. In making the referral, the organization shall comply with applicable privacy laws and regulations. Recipients and subrecipients shall document any objections from program participants and prospective program participants and any efforts to refer such participants to alternative providers in accordance with the requirements of § 92.508(a)(2)(xiii). Recipients shall ensure that all subrecipient agreements make organizations receiving program funds aware of these requirements.

(e) *Structures.* Program funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for explicitly religious activities. Program funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under this part. When a structure is used for both eligible and explicitly religious activities, program funds may not exceed the cost of those portions of the acquisition, new construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to the HOME program. Sanctuaries, chapels, or other rooms that a HOME program-funded religious congregation uses as its principal place of worship, however, are ineligible for HOME program-funded improvements. Disposition of real property after the term of the grant, or any change in the use of the property during the term of the grant, is subject to governmentwide regulations governing real property disposition (see 24 CFR parts 84 and 85).

(f) *Supplemental funds.* If a State or local government voluntarily contributes its own funds to supplement federally funded activities, the State or local government has the option to segregate the federal funds or commingle them. However, if the funds are commingled, this section applies to all of the commingled funds.

■ 27. In § 92.300, revise paragraphs (a), (e), and (f) to read as follows:

§ 92.300 Set-aside for community housing development organizations (CHDOs).

(a) Within 24 months after the date that HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnerships Agreement, the participating jurisdiction must reserve not less than 15 percent of the HOME allocation for investment only in housing to be owned, developed or sponsored by community housing development organizations. For a State, the HOME allocation includes funds reallocated under § 92.451(c)(2)(i) and, for a unit of general local government, includes funds transferred from a State under § 92.102(b). The participating jurisdiction must certify the organization as meeting the definition of ''community housing development organization'' and must document that the organization has capacity to own, develop, or sponsor housing each time it commits funds to the organization. For purposes of this paragraph:

(1) Funds are reserved when a participating jurisdiction enters into a written agreement with the community housing development organization (or project owner as described in paragraph (a)(4) of this section) committing the funds to a specific local project in accordance with paragraph (2) of the definition of ''commitment'' in § 92.2.

(2) Rental housing is ''owned'' by the community housing development organization if the community housing development organization is the owner in fee simple absolute of multifamily or single family housing (or has a long term ground lease) for rental to low-income families in accordance with § 92.252. If the housing is to be rehabilitated or constructed, the community housing development organization hires and oversees the developer that rehabilitates or constructs the housing. At minimum, the community housing development organization must hire or contract with an experienced project manager to oversee all aspects of the development, including obtaining zoning, securing non-HOME financing, selecting a developer or general contractor, overseeing the progress of the work and determining the reasonableness of costs. The community housing development organization must own the rental housing during development and for a period at least equal to the period of affordability in § 92.252. If the CHDO acquires housing that meets the property standards in § 92.251, the CHDO must own the rental housing for a period at least equal to the period of affordability in § 92.252.

(3) Rental housing is ''developed'' by the community development housing organization if the community housing development organization is the owner of multifamily or single family housing in fee simple absolute (or has a long term ground lease) and the developer of new housing that will be constructed or existing substandard housing that will be rehabilitated for rent to low-income families in accordance with § 92.252. To be the ''developer,'' the community development housing organization must be in sole charge of all aspects of the development process, including obtaining zoning, securing non-HOME financing, selecting architects, engineers and general contractors, overseeing the progress of the work and determining the reasonableness of costs. At a minimum, the community housing development organization must own the housing during development and for a period at least equal to the period of affordability in § 92.252.

(4) Rental housing is ''sponsored'' by the community development housing organization if it is rental housing ''owned'' or ''developed'' by a subsidiary of a community housing development organization, a limited partnership of which the community housing development organization or its subsidiary is the sole general partner, or a limited liability company of which the community housing development organization or its subsidiary is the sole managing member.

(i) The subsidiary of the community housing development organization may be a for-profit or nonprofit organization and must be wholly owned by the community housing development organization. If the limited partnership or limited liability company agreement permits the community housing development organization to be removed as general partner or sole managing member, the agreement must provide that the removal must be for cause and that the community housing development organization must be replaced with another community housing development organization.

(ii) The HOME funds must be provided to the entity that owns the project.

(5) HOME-assisted rental housing is also ''sponsored'' by a community housing development organization if the community housing development organization ''developed'' the rental housing project that it agrees to convey to an identified private nonprofit organization at a predetermined time after completion of the development of the project. Sponsored rental housing, as provided in this paragraph (a)(5), is subject to the following requirements:

(i) The private nonprofit organization may not be created by a governmental entity.

(ii) The HOME funds must be invested in the project that is owned by the community housing development organization.

(iii) Before commitment of HOME funds, the community housing development organization sponsor must select the nonprofit organization that will obtain ownership of the property.

(A) The nonprofit organization assumes the community housing development organization's HOME obligations (including any repayment of loans) for the rental project at a specified time after completion of development.

(B) If the housing is not transferred to the nonprofit organization, the community housing development organization sponsor remains responsible for the HOME assistance and the HOME project.

(6) Housing for homeownership is ''developed'' by the community development housing organization if the community housing development organization is the owner (in fee simple absolute) and developer of new housing that will be constructed or existing substandard housing that will be rehabilitated for sale to low-income families in accordance with § 92.254.

(i) To be the ''developer'' the community development housing organization must arrange financing of the project and be in sole charge of construction. The community housing development organization may provide direct homeownership assistance (e.g., downpayment assistance) when it sells the housing to low-income families and the community housing development organization will not be considered a subrecipient. The HOME funds for downpayment assistance shall not be greater than 10 percent of the amount of HOME funds for development of the housing.

(ii) The participating jurisdiction must determine and set forth in its written agreement with the community housing development organization the actual sales prices of the housing or the method by which the sales prices for the housing will be established and whether the proceeds must be returned to the participating jurisdiction or may be retained by the community housing development organization.

(A) While proceeds that the participating jurisdiction permits the community housing development organization to retain are not subject to the requirements of this part, the participating jurisdiction must specify in the written agreement with the community housing development organization whether the proceeds are to be used for HOME-eligible activities or other housing activities to benefit low-income families.

(B) Funds that are recaptured because the housing no longer meets the affordability requirements under § 92.254(a)(5)(ii) are subject to the requirements of this part in accordance with § 92.503.

(7) The participating jurisdiction determines the form of assistance (e.g., grant or loan) that it will provide to the community housing development organization receives or, for rental housing projects under paragraph (a)(4) of this section, to the entity that owns the project.

* * * * *

(e) If funds for operating expenses are provided under § 92.208 to a community housing development organization that is not also receiving funds under paragraph (a) of this section for housing to be owned, developed or sponsored by the community housing development organization, the participating jurisdiction's written agreement with the community housing development organization must provide that the community housing development organization is expected to receive funds under paragraph (a) of this section for a project within 24 months of the date of receiving the funds for operating expenses, and specifies the terms and conditions upon which this expectation is based.

(f) The participating jurisdiction must ensure that a community housing development organization does not receive HOME funding for any fiscal year in an amount that provides more than 50 percent or $50,000, whichever is greater, of the community housing development organization's total operating expenses in that fiscal year. This also includes organizational support and housing education provided under section 233(b)(1), (2), and (6) of the Act, as well as funds for operating expenses provided under § 92.208.

■ 28. In § 92.351, revise paragraphs (a)(1) and (a)(2)(ii) through (iv) to read as follows:

§ 92.351 Affirmative marketing; minority outreach program.

(a) *Affirmative marketing.* (1) Each participating jurisdiction must adopt and follow affirmative marketing procedures and requirements for rental and homebuyer projects containing five or more HOME-assisted housing units. Affirmative marketing requirements and procedures also apply to all HOME-funded programs, including, but not limited to, tenant-based rental assistance and downpayment assistance programs. Affirmative marketing steps consist of actions to provide information and otherwise attract eligible persons in the housing market area to the available housing without regard to race, color, national origin, sex, religion, familial status, or disability. If participating jurisdiction's written agreement with the project owner permits the rental housing project to limit tenant eligibility or to have a tenant preference in accordance with § 92.253(d)(3), the participating jurisdiction must have affirmative marketing procedures and requirements that apply in the context of the limited/preferred tenant eligibility for the project.

(2) * * *

(ii) Requirements and practices each subrecipient and owner must adhere to in order to carry out the participating jurisdiction's affirmative marketing procedures and requirements (e.g., use of commercial media, use of community contacts, use of the Equal Housing Opportunity logotype or slogan, and display of fair housing poster);

(iii) Procedures to be used by subrecipients and owners to inform and solicit applications from persons in the housing market area who are not likely to apply for the housing program or the housing without special outreach (e.g., through the use of community organizations, places of worship, employment centers, fair housing groups, or housing counseling agencies);

(iv) Records that will be kept describing actions taken by the participating jurisdiction and by subrecipients and owners to affirmatively market the program and units and records to assess the results of these actions; and

* * * * *

■ 29. In § 92.352, revise paragraph (a) to read as follows:

§ 92.352 Environmental review.

(a) *General.* The environmental effects of each activity carried out with HOME funds must be assessed in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321) and the related authorities listed in HUD's implementing regulations at 24 CFR parts 50 and 58. The applicability of the provisions of 24 CFR part 50 or part 58 is based on the HOME project (new construction, rehabilitation, acquisition) or activity (tenant-based rental assistance) as a whole, not on the type of the cost paid with HOME funds.

* * * * *

■ 30. In § 92.353 paragraph (c)(2)(C)(*1*)(*ii*) is revised to read as follows:

§ 92.353 Displacement, relocation, and acquisition.

* * * * *

(c) * * *

(2) * * *

(C) * * *

(*1*) * * *

(*ii*) The total tenant payment, as determined under 24 CFR 5.628, if the tenant is low-income, or 30 percent of gross household income, if the tenant is not low-income;

* * * * *

■ 31. In § 92.354, paragraphs (a)(1) and (3) are revised to read as follows:

§ 92.354 Labor.

(a) * * *

(1) Every contract for the construction (rehabilitation or new construction) of housing that includes 12 or more units assisted with HOME funds must contain a provision requiring the payment of not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 3141), to all laborers and mechanics employed in the development of any part of the housing. Such contracts must also be subject to the overtime provisions, as applicable, of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701).

* * * * *

(3) Participating jurisdictions, contractors, subcontractors, and other participants must comply with regulations issued under these acts and with other Federal laws and regulations pertaining to labor standards, as applicable. Participating jurisdictions shall be responsible for ensuring compliance by contractors and subcontractors with labor standards described in this section. In accordance with procedures specified by HUD, participating jurisdictions shall:

(i) Ensure that bid and contract documents contain required labor standards provisions and the appropriate Department of Labor wage determinations;

(ii) Conduct on-site inspections and employee interviews;

(iii) Collect and review certified weekly payroll reports;

(iv) Correct all labor standards violations promptly;

(v) Maintain documentation of administrative and enforcement activities; and

(vi) Require certification as to compliance with the provisions of this section before making any payment under such contracts.

* * * * *

■ 32. In § 92.356, paragraphs (b) and (f)(1) are revised to read as follows:

§ 92.356 Conflict of interest.

* * * * *

(b) *Conflicts prohibited.* No persons described in paragraph (c) of this section who exercise or have exercised any functions or responsibilities with respect to activities assisted with HOME funds or who are in a position to participate in a decision-making process or gain inside information with regard to these activities may obtain a financial interest or financial benefit from a HOME-assisted activity, or have a financial interest in any contract, subcontract, or agreement with respect to the HOME-assisted activity, or the proceeds from such activity, either for themselves or those with whom they have business or immediate family ties, during their tenure or for one year thereafter. Immediate family ties include (whether by blood, marriage or adoption) the spouse, parent (including a stepparent), child (including a stepchild), brother, sister (including a stepbrother or stepsister), grandparent, grandchild, and in-laws of a covered person.

* * * * *

(f) *Owners and Developers.* (1) No owner, developer, or sponsor of a project assisted with HOME funds (or officer, employee, agent, elected or appointed official, or consultant of the owner, developer, or sponsor or immediate family member or immediate family member of an officer, employee, agent, elected or appointed official, or consultant of the owner, developer, or sponsor) whether private, for-profit or nonprofit (including a community housing development organization (CHDO) when acting as an owner, developer, or sponsor) may occupy a HOME-assisted affordable housing unit in a project during the required period of affordability specified in § 92.252(e) or § 92.254(a)(4). This provision does not apply to an individual who receives HOME funds to acquire or rehabilitate his or her principal residence or to an employee or agent of the owner or developer of a rental housing project who occupies a housing unit as the project manager or maintenance worker.

* * * * *

■ 33. In § 92.500, paragraphs (c)(1), (d)(1)(A) and (C), and (d)(2) are revised to read as follows:

§ 92.500 The HOME Investment Trust Fund.

* * * * *

(c) * * *

(1) The local account of the HOME Investment Trust Fund includes deposits of HOME funds disbursed from the Treasury account; the deposit of any State funds (other than HOME funds transferred pursuant to § 92.102(b)(2)) or local funds that enable the jurisdiction to meet the participating threshold amount in § 92.102, any program income (from both the allocated funds and matching contributions in accordance with the definition of program income), and any repayments or recaptured funds as required by § 92.503. The local account must be interest-bearing.

* * * * *

(d)(1) * * *

(A) Any funds in the United States Treasury account that are required to be reserved (i.e., 15 percent of the funds) by a participating jurisdiction under § 92.300 that are not committed to a community housing development organization project within 24 months after the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement;

* * * * *

(C) Any funds in the United States Treasury account that are not expended within 5 years after the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement and any funds in the United States Treasury account that were committed to community housing development organization projects that are not expended within 5 years after the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement; and

* * * * *

(2) For purposes of determining the amount by which the HOME Investment Trust Fund will be reduced or recaptured under paragraphs (d)(1)(A), (B) and (C) of this section, HUD will consider the sum of commitments to CHDOs, commitments, or expenditures, as applicable, from all fiscal year allocations. This sum must be equal to or greater than the sum of all fiscal year allocations through the fiscal year allocation being examined (minus previous reductions to the HOME Investment Trust Fund), or in the case of commitments to CHDOs, 15 percent of those fiscal year allocations.

■ 34. In § 92.502, paragraphs (a), (b)(2), and (e) are revised to read as follows:

§ 92.502 Program disbursement and information system.

(a) *General.* The HOME Investment Trust Fund account established in the United States Treasury is managed through a computerized disbursement and information system established by HUD. The system disburses HOME funds that are allocated or reallocated, and collects and reports information on the use of HOME funds in the United States Treasury account. (For purposes of reporting in the Integrated Disbursement and Information System, a HOME project is an activity.) The participating jurisdiction must report all program income in HUD's computerized disbursement and information system.

(b) * * *

(2) If the project set-up information is not completed within 20 days of the

project set-up, the project may be cancelled by the system. In addition, a project that has been committed in the system for 12 months without an initial disbursement of funds may be cancelled by the system.

* * * * *

(e) *Access by other participants.* Access to the disbursement and information system by other entities participating in the HOME program (e.g., State recipients) will be governed by procedures established by HUD. Only participating jurisdictions and State recipients (if permitted by the State) may request disbursement.

■ 35. In § 92.503, paragraph (b)(3) is revised to read as follows:

§ 92.503 Program income, repayments, and recaptured funds.

* * * * *

(b) * * *

(3) HUD will instruct the participating jurisdiction to either repay the funds to the HOME Investment Trust Fund Treasury account or the local account. Generally, if the HOME funds were disbursed from the participating jurisdiction's HOME Investment Trust Fund Treasury account, they must be repaid to the Treasury account. If the HOME funds were disbursed from the participating jurisdiction's HOME Investment Trust Fund local account, they must be repaid to the local account. If the jurisdiction is not a participating jurisdiction at the time the repayment is made, the funds must be remitted to HUD, and reallocated in accordance with § 92.454.

* * * * *

■ 36. In § 92.504:
■ a. Paragraph (a) is revised;
■ b. Paragraphs (c)(1) introductory text, (c)(1)(i), (ii), (vii), and (xi) are revised;
■ c. Paragraph (c)(1)(xiii) is added;
■ d. Paragraphs (c)(2) introductory text, (c)(2)(i), (iv), (v), and (x) are revised;
■ e. Paragraph (c)(2)(xi) is added;
■ f. Paragraph (c)(3) introductory text is added;
■ g. Paragraphs (c)(3)(i) through (iv), (c)(3)(v)(A), (vi), (vii), and (x) are revised;
■ h. Paragraph (c)(3)(xi) is added;
■ i. Paragraph (c)(4) introductory text is revised;
■ j. Paragraph (c)(6) is added; and
■ k. Paragraph (d) is revised.

The revisions and additions read as follows:

§ 92.504 Participating jurisdiction responsibilities; written agreements; on-site inspection.

(a) *Responsibilities.* The participating jurisdiction is responsible for managing the day-to-day operations of its HOME program, ensuring that HOME funds are used in accordance with all program requirements and written agreements, and taking appropriate action when performance problems arise. The use of State recipients, subrecipients, or contractors does not relieve the participating jurisdiction of this responsibility. The performance and compliance of each contractor, State recipient, and subrecipient must be reviewed at least annually. The participating jurisdiction must have and follow written policies, procedures, and systems, including a system for assessing risk of activities and projects and a system for monitoring entities consistent with this section, to ensure that the requirements of this part are met.

* * * * *

(c) * * *

(1) *State recipient.* The provisions in the written agreement between the State and a State recipient will depend on the program functions that the State specifies the State recipient will carry out in accordance with § 92.201(b). In accordance with § 92.201, the written agreement must either require the State recipient to comply with the requirements established by the State or require the State recipient to establish its own requirements to comply with this part, including requirements for income determinations and underwriting subsidy layering guidelines, rehabilitation standards, refinancing guidelines, homebuyer program policies, and affordability.

(i) *Use of the HOME funds.* The agreement must describe the amount and use of the HOME funds to administer one or more programs to produce affordable housing, provide downpayment assistance, or provide tenant-based rental assistance, including the type and number of housing projects to be funded (e.g. the number of single-family homeowner loans to be made or number of homebuyers to receive downpayment assistance), tasks to be performed, a schedule for completing the tasks (including a schedule for committing funds to projects that meet the deadlines established by this part), a budget for each program, and any requirement for matching contributions. These items must be in sufficient detail to provide a sound basis for the State to effectively monitor performance under the agreement.

(ii) *Affordability.* The agreement must require housing assisted with HOME funds to meet the affordability requirements of § 92.252 or § 92.254, as applicable, and must require repayment of the funds if the housing does not meet the affordability requirements for the specified time period. The agreement must state if repayment of HOME funds or recaptured HOME funds must be remitted to the State or retained by the State recipient for additional eligible activities.

* * * * *

(vii) *Affirmative marketing.* The agreement must specify the State recipient's affirmative marketing responsibilities in accordance with § 92.351.

* * * * *

(xi) *Written agreement.* Before the State recipient provides funds to for-profit owners or developers, nonprofit owners or developers or sponsors, subrecipients, homeowners, homebuyers, tenants (or landlords) receiving tenant-based rental assistance, or contractors who are providing services to the State recipient, the State recipient must have a written agreement with such entities that meets the requirements of this section.

* * * * *

(xiii) *Fees.* The agreement must prohibit the State recipient and its subrecipients and community housing development organizations from charging servicing, origination, processing, inspection, or other fees for the costs of administering a HOME program, except as permitted by § 92.214(b)(1).

(2) *Subrecipient.* A subrecipient is a public agency or nonprofit organization selected by the participating jurisdiction to administer all or some of the participating jurisdiction's HOME programs to produce affordable housing, provide downpayment assistance, or provide tenant-based rental assistance. The agreement must set forth and require the subrecipient to follow the participating jurisdiction's requirements, including requirements for income determinations, underwriting and subsidy layering guidelines, rehabilitation standards, refinancing guidelines, homebuyer program policies, and affordability requirements. The agreement between the participating jurisdiction and the subrecipient must include:

(i) *Use of the HOME funds.* The agreement must describe the amount and use of the HOME funds for one or more programs, including the type and number of housing projects to be funded (e.g., the number of single-family homeowners loans to be made or the number of homebuyers to receive downpayment assistance), tasks to be performed, a schedule for completing the tasks (including a schedule for committing funds to projects in accordance with deadlines established by this part), a budget, any requirement for matching contributions and the period of the agreement. These items must be in sufficient detail to provide a sound basis for the participating jurisdiction to effectively monitor performance under the agreement.

* * * * *

(iv) *Other program requirements.* The agreement must require the subrecipient to carry out each activity in compliance with all Federal laws and regulations described in subpart H of this part, except that the subrecipient does not assume the participating jurisdiction's responsibilities for environmental review under § 92.352 and the intergovernmental review process in § 92.357 does not apply. The agreement must set forth the requirements the subrecipient must follow to enable the participating jurisdiction to carry environmental review responsibilities before HOME funds are committed to a project.

(v) *Affirmative marketing.* The agreement must specify the subrecipient's affirmative marketing responsibilities in accordance with § 92.351.

* * * * *

(x) *Written agreement.* Before the subrecipient provides HOME funds to for-profit owners or developers, nonprofit owners or developers or sponsors, subrecipients, homeowners, homebuyers, tenants (or landlords) receiving tenant-based rental assistance, or contractors, the subrecipient must have a written agreement that meets the requirements of this section. The agreement must state if repayment of HOME funds or recaptured HOME funds must be remitted to the participating jurisdiction or retained by the subrecipient for additional eligible activities.

(xi) *Fees.* The agreement must prohibit the subrecipient and any community housing development organizations from charging servicing, origination, or other fees for the costs of administering the HOME program, except as permitted by § 92.214(b)(1).

(3) *For-profit or nonprofit housing owner, sponsor, or developer (other than single-family owner-occupant).* The participating jurisdiction may preliminarily award HOME funds for a proposed project, contingent on conditions such as obtaining other financing for the project. This preliminary award is not a commitment to a project. The written agreement committing the HOME funds to the project must meet the requirements of ''commit to a specific local project'' in the definition of ''commitment'' in § 92.2 and contain the following:

(i) *Use of the HOME funds.* The agreement between the participating jurisdiction and a for-profit or nonprofit housing owner, sponsor, or developer must describe the address of the project or the legal description of the property if a street address has not been assigned to the property, the use of the HOME funds and other funds for the project, including the tasks to be performed for the project, a schedule for completing the tasks and the project, and a complete budget. These items must be in sufficient detail to provide a sound basis for the participating jurisdiction to effectively monitor performance under the agreement to achieve project completion and compliance with the HOME requirements.

(ii) *Affordability.* The agreement must require housing assisted with HOME funds to meet the affordability requirements of § 92.252 or § 92.254, as applicable, and must require repayment of the funds if the housing does not meet the affordability requirements for the specified time period. The affordability requirements in § 92.252 must be imposed by deed restrictions, covenants running with the land, use restrictions, or other mechanisms approved by HUD under which the participating jurisdiction has the right to require specific performance.

(A) If the owner or developer is undertaking rental projects, the agreement must establish the initial rents, the procedures for rent increases pursuant to § 92.252(f)(2), the number of HOME units, the size of the HOME units, and the designation of the HOME units as fixed or floating, and include the requirement that the owner or developer provide the address (e.g., street address and apartment number) of each HOME unit no later than the time of initial occupancy.

(B) If the owner or developer is undertaking a homeownership project for sale to homebuyers in accordance with § 92.254(a), the agreement must set forth the resale or recapture requirements that must be imposed on the housing, the sales price or the basis upon which the sales price will be determined, and the disposition of the sales proceeds. Recaptured funds must be returned to the participating jurisdiction.

(iii) *Project requirements.* The agreement must require compliance with project requirements in subpart F of this part, as applicable in accordance with the type of project assisted. The agreement may permit the owner to limit eligibility or give a preference to a particular segment of the population in accordance with § 92.253(d).

(iv) *Property standards.* The agreement must require the housing to meet the property standards in § 92.251, upon project completion. The agreement must also require owners of rental housing assisted with HOME funds to maintain the housing compliance with § 92.251 for the duration of the affordability period.

(v) * * *

(A) The agreement must specify the owner or developer's affirmative marketing responsibilities as enumerated by the participating jurisdiction in accordance with § 92.351.

* * * * *

(vi) *Records and reports.* The agreement must specify the particular records that must be maintained and the information or reports that must be submitted in order to assist the participating jurisdiction in meeting its recordkeeping and reporting requirements. The owner of rental housing must annually provide the participating jurisdiction with information on rents and occupancy of HOME-assisted units to demonstrate compliance with § 92.252. If the rental housing project has floating HOME units, the owner must provide the participating jurisdiction with information regarding unit substitution and filling vacancies so that the project remains in compliance with HOME rental occupancy requirements. The agreement must specify the reporting requirements (including copies of financial statements) to enable the participating jurisdiction to determine the financial condition (and continued financial viability) of the rental project.

(vii) *Enforcement of the agreement.* The agreement must provide for a means of enforcement of the affordable housing requirements by the participating jurisdiction and the intended beneficiaries. This means of enforcement may include liens on real property, deed restrictions, or covenants running with the land. The affordability requirements in § 92.252 must be imposed by deed restrictions, covenants running with the land, use restrictions, or other mechanisms approved by HUD under which the participating jurisdiction has the right to require specific performance. In addition, the agreement must specify remedies for breach of the provisions of the agreement.

* * * * *

(x) *Community housing development organization provisions.* If the nonprofit owner or developer is a community housing development organization and is using set-aside funds under § 92.300, the agreement must include the appropriate provisions under §§ 92.300, 92.301, and 92.303. If the community development organization is receiving HOME funds as a developer of homeownership housing, the agreement must specify if the organization may retain proceeds from the sale of the housing and whether the proceeds are to be used for HOME-eligible or other housing activities to benefit low-income families. Recaptured funds are subject to the requirements of § 92.503. If the community housing development organization is receiving assistance for operating expenses, see paragraph (c)(6) of this section.

(xi) *Fees.* The agreement must prohibit project owners from charging fees that are not customarily charged in rental housing such as laundry room access fees, and other fees. However, rental project owners may charge reasonable application fees to prospective tenants may charge parking fees to tenants only if such fees are customary for rental housing projects in the neighborhood; and may charge fees for services such as bus transportation or meals, as long as such services are voluntary. The agreement must also prohibit the developer that is undertaking a homeownership project from charging servicing, origination, processing, inspection, or other fees for the costs of providing homeownership assistance.

(4) *Contractor.* The participating jurisdiction selects a contractor through applicable procurement procedures and requirements. The contractor provides goods or services in accordance with a written agreement (the contract). For contractors who are administering all or some of the participating jurisdiction's HOME programs or specific services for one or more programs, the contract must include at a minimum the following provisions:

* * * * *

(6) *Community housing development organization receiving assistance for operating expenses.* The agreement must describe the use of HOME funds for operating expenses; e.g., salaries, wages, and other employee compensation and benefits; employee education, training, and travel; rent; utilities; communication costs; taxes; insurance; equipment; and materials and supplies. If the community housing development organization is not also receiving funds for a housing project to be developed, sponsored, or owned by the community housing development organization, the agreement must provide that the community housing development organization is expected to receive funds for a project within 24 months of the date of receiving the funds for operating expenses, and must specify the terms and conditions upon which this expectation is based and the consequences of failure to receive funding for a project.

(d) *On-site inspections and financial oversight.* (1) *Inspections.* The participating jurisdiction must inspect each project at project completion and during the period of affordability to determine that the project meets the property standards of § 92.251.

(i) *Completion inspections.* Before completing the project in the disbursement and information system established by HUD, the participating jurisdiction must perform an on-site inspection of HOME-assisted housing to determine that all contracted work has been completed and that the project complies with the property standards of § 92.251.

(ii) *Ongoing periodic inspections of HOME-assisted rental housing.* During the period of affordability, the participating jurisdiction must perform on-site inspections of HOME-assisted rental housing to determine compliance with the property standards of § 92.251 and to verify the information submitted by the owners in accordance with the requirements of § 92.252. The inspections must be in accordance with the inspection procedures that the participating jurisdiction establishes to meet the inspection requirements of § 92.251.

(A) The on-site inspections must occur within 12 months after project completion and at least once every 3 years thereafter during the period of affordability.

(B) If there are observed deficiencies for any of the inspectable items in the property standards established by the participating jurisdiction, in accordance with the inspection requirements of § 92.251, a follow-up on-site inspection to verify that deficiencies are corrected must occur within 12 months. The participating jurisdiction may establish a list of non-hazardous deficiencies for which correction can be verified by third party documentation (e.g., paid invoice for work order) rather than re-inspection. Health and safety deficiencies must be corrected immediately, in accordance with § 92.251. The participating jurisdiction must adopt a more frequent inspection schedule for properties that have been found to have health and safety deficiencies.

(C) The property owner must annually certify to the participating jurisdiction that each building and all HOME-assisted units in the project are suitable for occupancy, taking into account State and local health, safety, and other applicable codes, ordinances, and requirements, and the ongoing property standards established by the participating jurisdiction to meet the requirements of § 92.251.

(D) Inspections must be based on a statistically valid sample of units appropriate for the size of the HOME-assisted project, as set forth by HUD through notice. For projects with one-to-four HOME-assisted units, participating jurisdiction must inspect 100 percent of the HOME-assisted units and the inspectable items (site, building exterior, building systems, and common areas) for each building housing HOME-assisted units.

(iii) *Annual inspections.* Tenant-based rental assistance (TBRA). All housing occupied by tenants receiving HOME tenant-based rental assistance must meet the standards in 24 CFR 982.401 or the successor requirements as established by HUD. The participating jurisdiction must perform annual on-site inspections of rental housing occupied by tenants receiving HOME-assisted TBRA to determine compliance with these standards.

(2) *Financial oversight.* During the period of affordability, the participating jurisdiction must examine at least annually the financial condition of HOME-assisted rental projects with 10 units or more to determine the continued financial viability of the housing and must take actions to correct problems, to the extent feasible.

■ 37. Revise § 92.505 to read as follows:

§ 92.505 Applicability of uniform administrative requirements.

(a) *Governmental entities.* The requirements of 2 CFR part 225 (OMB Circular No. A–87) and the following requirements of 24 CFR part 85 apply to the participating jurisdictions, State recipients, and governmental subrecipients receiving HOME funds: §§ 85.6, 85.12, 85.20, 85.22, 85.26, 85.32 through 85.34, 85.36, 85.44, 85.51, and 85.52.

(b) *Nonprofit organizations.* The requirements of 2 CFR part 230 (OMB Circular No. A–122) and the following requirements of 24 CFR part 84 apply to subrecipients receiving HOME funds that are nonprofit organizations that are not governmental subrecipients: §§ 84.2, 84.5, 84.13 through 84.16, 84.21, 84.22, 84.26 through 84.28, 84.30, 84.31, 84.34 through 84.37, 84.40 through 84.48, 84.51, 84.60 through 84.62, 84.72, and 84.73.

■ 38. In § 92.508:

■ a. Paragraphs (a)(2)(ii), (iii), and (viii) are revised, and a new paragraph (a)(2)(xiii) is added;
■ b. Paragraphs (a)(3)(i), (ii), (iii), (iv), (vi), and (xiii) are revised;
■ c. Paragraph (a)(3)(xiv) is added;
■ d. Paragraphs (a)(4)(i) and (iii) are revised; and
■ e. Paragraphs (a)(6)(i) through (a)(6)(iii) are redesignated as paragraphs (a)(6)(ii) through (a)(6)(iv) and new paragraph (a)(6)(i) is added.

The revisions and addition read as follows:

§ 92.508 Recordkeeping.

(a) * * *

(2) * * *

(ii) The forms of HOME assistance used in the program, including any forms of investment described in the Consolidated Plan under 24 CFR part 91 that are not identified in § 92.205(b), and which are specifically approved by HUD.

(iii) The underwriting and subsidy layering guidelines adopted in accordance with § 92.250 that support the participating jurisdiction's Consolidated Plan certification.

* * * * *

(viii) If HOME funds are used for acquisition of housing for homeownership, the resale or recapture guidelines established in accordance with § 92.254(a)(5), as set forth in the Consolidated Plan.

* * * * *

(xiii) Records documenting objections to the religious character of an organization that provides services under the HOME program, and the reasonable efforts undertaken to identify and refer the program participant to an alternative provider to which the prospective program participant has no objection, as provided in § 92.257(d).

(3) *Project records.* (i) A full description of each project assisted with HOME funds, including the location (address of each unit), form of HOME assistance, and the units or tenants assisted with HOME funds.

(ii) The source and application of funds for each project, including supporting documentation in accordance with 24 CFR 85.20; and records to document the eligibility and permissibility of the project costs, including the documentation of the actual HOME-eligible development costs of each HOME-assisted unit (through allocation of costs, if permissible under § 92.205(d)) where HOME funds are used to assist less than all of the units in a multi-unit project.

(iii) Records demonstrating that each rental housing or homeownership project meets the minimum per-unit subsidy amount of § 92.205(c), the maximum per-unit subsidy amount of § 92.250(a), and the subsidy layering and underwriting evaluation adopted in accordance with § 92.250(b).

(iv) Records (e.g., inspection reports) demonstrating that each project meets the property standards of § 92.251 at project completion. In addition, during the period of affordability, records for rental projects demonstrating compliance with the property standards and financial reviews and actions pursuant to § 92.504(d).

* * * * *

(vi) Records demonstrating that each tenant-based rental assistance project meets the written tenant selection policies and criteria of § 92.209(c), including any targeting requirements, the rent reasonableness requirements of § 92.209(f), the maximum subsidy provisions of § 92.209(h), property inspection reports, and calculation of the HOME subsidy.

* * * * *

(xiii) Records demonstrating that a site and neighborhood standards review was conducted for each project which includes new construction of rental housing assisted under this part to determine that the site meets the requirements of 24 CFR 983.57(e)(2) and (e)(3), in accordance with § 92.202.

(xiv) Records (written agreements) demonstrating compliance with the written agreements requirements in § 92.504.

(4) * * *

(i) Written agreements committing HOME funds to CHDO projects in accordance with § 92.300(a).

* * *

(iii) The name and qualifications of each CHDO and amount of HOME CHDO set-aside funds committed.

* * * * *

(6) *Program administration records.* (i) Written policies, procedures, and systems, including a system for assessing risk of activities and projects and a system for monitoring entities consistent with this section, to ensure that the requirements of this part are met.

* * * * *

■ 39. In § 92.551, paragraph (c)(1)(vii) is redesignated as paragraph (c)(1)(viii) and revised, new paragraphs (c)(1)(vii) and (c)(1)(ix) are added, and paragraph (c)(2) is revised to read as follows:

§ 92.551 Corrective and remedial actions.

* * * * *

(c) * * *

(1) * * *

(vii) Establishing procedures to ensure compliance with HOME requirements;

(viii) Making matching contributions as draws are made from the participating jurisdiction's HOME Investment Trust Fund United States Treasury Account and establishing a remedial plan to make up the matching contributions deficit; and

(ix) If the participating jurisdiction is a metropolitan city, forming a consortium with the urban county if the urban county is willing to carry out the HOME program in the metropolitan city.

(2) HUD may also change the method of payment from an advance to reimbursement basis and may require supporting documentation to be submitted for HUD review for each payment request before payment is made; determine the participating jurisdiction to be high risk and impose special conditions or restrictions on the next year's allocation in accordance with 24 CFR 85.12; and take other remedies that may be legally available.

■ 40. In § 92.552, paragraph (b) is revised to read as follows:

§ 92.552 Notice and opportunity for hearing; sanctions.

* * * * *

(b) *Proceedings.* When HUD proposes to take action pursuant to this section, the respondent in the proceedings will be the participating jurisdiction or, at HUD's option, the State recipient. Proceedings will be conducted in accordance with 24 CFR part 26.

■ 41. In § 92.614:
■ a. Paragraphs (a)(3) through (6) are redesignated as paragraphs (a)(4) through (7), respectively;
■ b. New paragraph (a)(3) is added;
■ c. Paragraph (b)(1) is removed; and
■ d. Paragraphs (b)(2) and (3) are redesignated as paragraphs (b)(1) and (2), respectively.

The addition reads as follows:

§ 92.614 Other Federal requirements.

(a) * * *

(3) *Affirmative marketing.* The affirmative marketing requirements contained in § 92.351(a).

* * * * *

Dated: July 15, 2013.

Shaun Donovan,

Secretary.

[FR Doc. 2013–17348 Filed 7–23–13; 8:45 am]

BILLING CODE 4210–67–P

FEDERAL REGISTER

Vol. 78 Wednesday,
No. 142 July 24, 2013

Part III

Bureau of Consumer Financial Protection

12 CFR Parts 1024 and 1026
Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z); Final Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Parts 1024 and 1026

[Docket No. CFPB–2013–0010]

RIN 3170–AA37

Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretations.

SUMMARY: This rule amends some of the final mortgage rules issued by the Bureau of Consumer Financial Protection (Bureau) in January of 2013. These amendments clarify, correct, or amend provisions on the relation to State law of Regulation X's servicing provisions; implementation dates for adjustable-rate mortgage servicing; exclusions from requirements on higher-priced mortgage loans; the small servicer exemption from certain servicing rules; the use of government-sponsored enterprise and Federal agency purchase, guarantee or insurance eligibility for determining qualified mortgage status; and the determination of debt and income for purposes of originating qualified mortgages.

DATES: This rule is effective January 10, 2014, except for the amendment to § 1026.35(e), which is effective July 24, 2013. See part V, Effective Date, in **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Marta Tanenhaus, Senior Counsel, Paul Ceja, Senior Counsel and Special Advisor; Joseph Devlin, Counsel; Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Summary of Final Rule

In January 2013, the Bureau issued several final rules concerning mortgage markets in the United States (2013 Title XIV Final Rules), pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Public Law 111–203, 124 Stat. 1376 (2010). On January 10, 2013, the Bureau issued the 2013 ATR Final Rule; [1] on January 17, 2013, the Bureau issued the 2013 Mortgage Servicing Final Rules; [2] and on May 16, 2013, the Bureau issued Amendments to the 2013 Escrows Final Rule.[3] This final rule makes several amendments to those rules. These amendments clarify, correct, or amend provisions on (1) the relation to State law of Regulation X's servicing provisions; (2) implementation dates for adjustable-rate mortgage disclosures; (3) exclusions from the repayment ability and prepayment penalty requirements for higher-priced mortgage loans (HPMLs); (4) the small servicer exemption from certain of the new servicing rules; (5) the use of government-sponsored enterprise (GSE) and Federal agency purchase, guarantee or insurance eligibility for determining qualified mortgage (QM) status; and (6) the determination of debt and income for purposes of originating QMs. In addition to these six revisions and clarifications, which are discussed more fully below, the Bureau is making certain technical corrections to the regulations with no substantive change intended.

First, the Bureau is amending the commentary to the preemption provision of Regulation X to clarify that the regulation does not occupy the field of regulation of the practices covered by the Real Estate Settlement Procedures Act (RESPA) or Regulation X, including with respect to mortgage servicers or mortgage servicing. The rule also redesignates the Regulation X preemption provision, § 1024.13, as § 1024.5(c).

Second, in response to industry requests, the Bureau is providing clarification of the implementation dates for adjustable-rate mortgage provisions § 1026.20(c) and (d) of the 2013 TILA Servicing Final Rule. This clarification is provided in the section-by-section analysis and does not revise the 2013 TILA Servicing Final Rule or its official commentary.

Third, the Bureau is revising § 1026.35(e) of Regulation Z, as amended by the Amendments to the 2013 Escrows Final Rule,[4] to clarify that construction and bridge loans and reverse mortgages are not subject to its requirements regarding repayment abilities and prepayment penalties for HPMLs.

Fourth, the Bureau is clarifying the scope and application of the exemption for small servicers that is set forth in Regulation Z's periodic statement provision, § 1026.41, and incorporated by cross-reference in certain provisions of Regulation X. The rule clarifies which mortgage loans to consider in determining small servicer status and the application of the small servicer exemption with regard to servicer/affiliate and master servicer/subservicer relationships. Further, the rule provides that three types of mortgage loans will not be considered in determining small servicer status: mortgage loans voluntarily serviced for an unaffiliated entity without remuneration, reverse mortgages, and mortgage loans secured by a consumer's interest in timeshare plans.

Fifth, the Bureau is revising regulatory text and an official interpretation adopted in the 2013 ATR Final Rule and adding a new official interpretation to describe qualified mortgages that are entitled to a presumption of compliance with the ability-to-repay requirements under the Dodd-Frank Act. Specifically, the Bureau is providing clarifications with regard to § 1026.43(e)(4), which allows qualified mortgage status to certain loans that are eligible for purchase, guarantee, or insurance by the GSEs or federal agencies. Section 1026.43(e)(4)(ii)(A)–(E) is amended to make clear that matters wholly unrelated to ability to repay will not be relevant to determination of QM status under this provision. Comment 43(e)(4)–4 explains that matters wholly unrelated to ability to repay are those matters that are wholly unrelated to credit risk or the underwriting of the loan. Comment 43(e)(4)–4 also clarifies the standards a creditor must meet when relying on a written guide or an automated underwriting system to determine qualified mortgage status under § 1026.43(e)(4). In addition, the revised comment specifies that a creditor relying on approval through an automated underwriting system to establish qualified mortgage status must also meet the conditions on approval that are generated by that same system.

The Bureau is also revising comment 43(e)(4)–4 to clarify that a loan meeting eligibility requirements provided in a written agreement with one of the GSEs, HUD, VA, USDA, or RHS is also eligible for purchase or guarantee by the GSEs or insured or guaranteed by the agencies for the purposes of § 1026.43(e)(4). In addition, the comment has been clarified to provide that loans receiving individual waivers from GSEs or agencies will be considered eligible as

[1] Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z) (2013 ATR Final Rule), 78 FR 6407 (Jan. 30, 2013).

[2] Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) (2013 RESPA Servicing Final Rule) and Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z) (2013 TILA Servicing Final Rule) (together, 2013 Mortgage Servicing Final Rules), 78 FR 10695 (Feb. 14, 2013) (Regulation X), 78 FR 10901 (Feb. 14, 2013) (Regulation Z).

[3] Amendments to the 2013 Escrows Final Rule under the Truth in Lending Act (Regulation Z), 78 FR 30739 (May 23, 2013). Those amendments revised 78 FR 4726 (Jan. 22, 2013) (2013 Escrows Final Rule).

[4] 78 FR 30739 (May 23, 2013).

well. Thus, such loans could be qualified mortgages.

The Bureau is also issuing new comment 43(e)(4)–5, which provides that a repurchase or indemnification demand by the GSEs, HUD, VA, USDA, or RHS is not dispositive for ascertaining qualified mortgage status. The comment provides two examples to illustrate the application of this guidance.

Sixth, the Bureau is amending appendix Q of Regulation Z to facilitate compliance and ensure access to credit by assisting creditors in determining a consumer's debt-to-income ratio (DTI) for the purposes of § 1026.43(e)(2), the primary qualified mortgage provision. The Bureau is making changes to address compliance challenges raised by stakeholders, as well as technical and wording changes for clarification purposes. The Bureau's revisions include clarifications to appendix Q on: (1) Stability of income, and the creditor requirement to evaluate the probability of the consumer's continued employment; (2) with regard to salary, wage, and other forms of consumer income, the creditor requirement to determine whether the consumer's income level can reasonably be expected to continue; (3) creditor analysis of consumer overtime and bonus income; (4) creditor analysis of consumer Social Security income; (5) requirements related to the analysis of self-employed consumer income; (6) requirements related to non-employment related consumer income, including creditor analysis of consumer trust income; and (7) creditor analysis of rental income. The Bureau is also revising the introduction to appendix Q to make clear that creditors may refer to other federal agency and GSE guidance that is in accordance with appendix Q as a resource, and to provide default rules and an optional safe harbor when appendix Q's standards do not otherwise resolve how to treat a particular type of debt or income.

II. Background

A. Title XIV Rulemakings Under the Dodd-Frank Act

In response to an unprecedented cycle of expansion and contraction in the mortgage market that sparked the most severe U.S. recession since the Great Depression, Congress passed the Dodd-Frank Act, which was signed into law on July 21, 2010. In the Dodd-Frank Act, Congress established the Bureau and, under sections 1061 and 1100A, generally consolidated the rulemaking authority for Federal consumer financial laws, including the Truth in Lending Act (TILA) and RESPA, in the Bureau.[5] At the same time, Congress significantly amended the statutory requirements governing mortgage practices with the intent to restrict the practices that contributed to and exacerbated the crisis. Under the statute, most of these new requirements would have taken effect automatically on January 21, 2013, if the Bureau had not issued implementing regulations by that date.[6] To avoid uncertainty and potential disruption in the national mortgage market at a time of economic vulnerability, the Bureau issued several final rules in a span of less than two weeks in January 2013 to implement these new statutory provisions and provide for an orderly transition.

On January 10, 2013, the Bureau issued the 2013 ATR Final Rule, Escrow Requirements Under the Truth in Lending Act (Regulation Z) (2013 Escrows Final Rule),[7] and High-Cost Mortgages and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X) (2013 HOEPA Final Rule).[8] On January 17, 2013, the Bureau issued the 2013 Mortgage Servicing Final Rules. On January 18, 2013, the Bureau issued Appraisals for Higher-Priced Mortgage Loans (Regulation Z)[9] (issued jointly with other agencies) and Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B) (2013 Appraisals Final Rule).[10] On January 20, 2013, the Bureau issued Loan Originator Compensation Requirements Under the Truth in Lending Act (Regulation Z) (2013 Loan Originator Final Rule).[11] Most of these rules will become effective on January 10, 2014.

Concurrent with the 2013 ATR Final Rule, on January 10, 2013, the Bureau issued Proposed Amendments to the Ability-to-Repay Standards Under the Truth in Lending Act (Regulation Z) (2013 ATR Concurrent Proposal).[12] This proposal has now been made final (May 2013 ATR Final Rule).[13] The May 2013 ATR Final Rule provides exemptions for creditors with certain designations, loans pursuant to certain programs, certain nonprofit creditors, and mortgage loans made in connection with certain Federal emergency economic stabilization programs. The final rule also provides an additional definition of a qualified mortgage for certain loans made and held in portfolio by small creditors and a temporary definition of a qualified mortgage for balloon loans. Finally, the May 2013 ATR Final Rule modifies the requirements regarding the inclusion of loan originator compensation in the points and fees calculation.

B. Implementation Initiative for New Mortgage Rules

On February 13, 2013, the Bureau announced an initiative to support implementation of its new mortgage rules (Implementation Plan),[14] under which the Bureau would work with the mortgage industry and other stakeholders to ensure that the new rules can be implemented accurately and expeditiously. The Implementation Plan included (1) coordination with other agencies; (2) publication of plain-language guides to the new rules; (3) publication of additional corrections and clarifications of the new rules, as needed; (4) publication of readiness guides for the new rules; and (5) education of consumers on the new rules.

This final rule is the third final rule providing additional revisions and clarifications of and amendments to the 2013 Title XIV Final Rules. In addition, the Bureau issued a proposed rule with further revisions and clarifications of and amendments to several of the 2013 Title XIV Final Rules on June 24, 2013. The purpose of these updates is to address important questions raised by industry, consumer groups, or other agencies. Priority for these updates is given to issues that are important to a large number of stakeholders and that critically affect mortgage companies' implementation decisions. Previously, the Bureau issued a final rule[15] providing corrections and clarifications of its 2013 Escrows Final Rule, and a final rule delaying the effective date for a provision related to credit insurance

[5] Sections 1011 and 1021 of the Dodd-Frank Act, in title X, the ''Consumer Financial Protection Act,'' Public Law 111–203, sections 1001–1100H, codified at 12 U.S.C. 5491, 5511. The Consumer Financial Protection Act is substantially codified at 12 U.S.C. 5481–5603. Section 1029 of the Dodd-Frank Act excludes from this transfer of authority, subject to certain exceptions, any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. 12 U.S.C. 5519.

[6] Dodd-Frank Act section 1400(c), 15 U.S.C. 1601 note.

[7] 78 FR 4726 (Jan. 22, 2013).

[8] 78 FR 6855 (Jan. 31, 2013).

[9] 78 FR 10367 (Feb. 13, 2013).

[10] 78 FR 7215 (Jan. 31, 2013).

[11] 78 FR 11279 (Feb. 15, 2013).

[12] 78 FR 6622 (Jan. 30, 2013).

[13] 78 FR 35429 (Jun. 12, 2013).

[14] Consumer Financial Protection Bureau Lays Out Implementation Plan for New Mortgage Rules. Press Release. Feb. 13, 2013.

[15] 78 FR 30739 (May 23, 2013).

financing in the 2013 Loan Originator Final Rule. On June 24, 2013, the Bureau issued additional proposed clarifications [16] to several of the new mortgage rules, including the servicing rules touched on here and the 2013 Loan Originator Final Rule. The Bureau expects to review the comments received and finalize that proposal later this summer. Going forward, the Bureau will continue to assess whether additional clarifications or revisions are warranted.

Comments on the Proposed Rule

The Bureau received 73 comments on the proposed rule [17] on which this final rule is based. Many of these comments discussed issues that the proposed rule did not touch upon such as disparate impact in regard to fair lending enforcement, calculation methods for residual income, and whether or not the special QM provision at § 1026.43(e)(4) should be eliminated before the rule goes into effect. The Bureau notes that it would be inconsistent with the Administrative Procedure Act (APA) to make changes outside the scope of the proposal because the other commenters and the public would not have notice and opportunity to comment. In addition, these regulatory updates are intended to focus on specific narrow implementation issues, and broader policy changes would not be appropriate as part of this process.

The Bureau has examined all comments submitted and will discuss those that were responsive to the proposal in the section-by-section analysis below.

III. Legal Authority

The Bureau is issuing this final rule pursuant to its authority under RESPA, TILA, and the Dodd-Frank Act. Section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies, including the Federal Reserve Board (Board). The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.'' [18] Section 1061 of the Dodd-Frank Act also transferred to the Bureau all of HUD's consumer protection functions relating to RESPA.[19] Title X of the Dodd-Frank Act, including section 1061, along with RESPA, TILA, and certain subtitles and provisions of title XIV of the Dodd-Frank Act are Federal consumer financial laws.[20]

A. RESPA

Section 19(a) of RESPA, 12 U.S.C. 2617(a), authorizes the Bureau to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of RESPA, which include its consumer protection purposes. In addition, section 6(j)(3) of RESPA, 12 U.S.C. 2605(j)(3), authorizes the Bureau to establish any requirements necessary to carry out section 6 of RESPA, and section 6(k)(1)(E) of RESPA, 12 U.S.C. 2605(k)(1)(E), authorizes the Bureau to prescribe regulations that are appropriate to carry out RESPA's consumer protection purposes. As identified in the 2013 RESPA Servicing Final Rule, the consumer protection purposes of RESPA include responding to borrower requests and complaints in a timely manner, maintaining and providing accurate information, helping borrowers avoid unwarranted or unnecessary costs and fees, and facilitating review for foreclosure avoidance options.

B. TILA

Section 105(a) of TILA, 15 U.S.C. 1604(a), authorizes the Bureau to prescribe regulations to carry out the purposes of TILA. Under 105(a) such regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. A purpose of TILA is ''to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.'' TILA section 102(a), 15 U.S.C. 1601(a). In particular, it is a purpose of TILA section 129C, as amended by the Dodd-Frank Act, to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive. Section 105(f) of TILA, 15 U.S.C. 1604(f), authorizes the Bureau to exempt from all or part of TILA any class of transactions if the Bureau determines that TILA coverage does not provide a meaningful benefit to consumers in the form of useful information or protection. Accordingly, the Bureau has authority to issue regulations pursuant to title X as well as RESPA and TILA, as amended by title XIV.

In addition, to constitute a qualified mortgage a loan must meet ''any guidelines or regulations established by the Bureau relating to ratios of total monthly debt to monthly income or alternative measures of ability to pay regular expenses after payment of total monthly debt, taking into account the income levels of the borrower and such other factors as the Bureau may determine are relevant and consistent with the purposes described in [TILA section 129C(b)(3)(B)(i)].'' The Dodd Frank Act also provides the Bureau with authority to prescribe regulations that revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of the ability-to-repay requirements; or are necessary and appropriate to effectuate the purposes of the ability-to-repay requirements, to prevent circumvention or evasion thereof, or to facilitate compliance with TILA sections 129B and 129C. TILA section 129C(b)(3)(B)(i), 15 U.S.C. 1639c(b)(3)(B)(i). In addition, TILA section 129C(b)(3)(A) provides the Bureau with authority to prescribe regulations to carry out the purposes of the qualified mortgage provisions, such as to ensure that responsible and affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA section 129C. TILA section 129C(b)(3)(A), 15 U.S.C. 1639c(b)(3)(A).

C. The Dodd-Frank Act

Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions

[16] 78 FR 39902 (July 2, 2013).

[17] 78 FR 25638 (May 2, 2013).

[18] 12 U.S.C. 5581(a)(1).

[19] Public Law 111–203, 124 Stat. 1376, section 1061(b)(7); 12 U.S.C. 5581(b)(7).

[20] Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws'' and the provisions of title X of the Dodd-Frank Act); Dodd-Frank Act section 1002(12), 12 U.S.C. 5481(12) (defining ''enumerated consumer laws'' to include TILA), Dodd-Frank section 1400(b), 15 U.S.C. 1601 note (defining ''enumerated consumer laws'' to include certain subtitles and provisions of Title XIV).

thereof.'' 12 U.S.C. 5512(b)(1). Title X of the Dodd-Frank Act is a Federal consumer financial law. Accordingly, the Bureau is exercising its authority under the Dodd-Frank Act section 1022(b) to prescribe rules that carry out the purposes and objectives of title X, as well as of RESPA, TILA, and the enumerated subtitles and provisions of title XIV of the Dodd-Frank Act, and to prevent evasion of those laws.

The Bureau is amending certain rules finalized in January, 2013, that implement a number of Dodd-Frank Act provisions. In particular, the Bureau is clarifying or amending regulatory provisions and associated commentary adopted by the 2013 ATR Final Rule,[21] the 2013 TILA Servicing Final Rule,[22] the 2013 RESPA Servicing Final Rule,[23] and the 2013 Escrows Final Rule[24] as amended by the 2013 Amendments to the 2013 Escrows Final Rule.[25]

IV. Section-by-Section Analysis

A. Regulation X

Subpart A—General Provisions

The Bureau proposed a technical amendment to the heading for Subpart A of Regulation X from ''Subpart A—General'' to ''Subpart A—General Provisions'' to conform the heading in the text of the regulation to the heading set forth in the corresponding commentary. No comments were received on this change, and it is adopted as proposed.

Section 1024.5 Coverage of RESPA

The Proposal

The Bureau proposed to redesignate § 1024.13 as § 1024.5(c). Section 1024.13, ''Relation to State laws,'' sets forth rules regarding the relationship of the requirements in RESPA and Regulation X to requirements established pursuant to State law. In the 2013 RESPA Servicing Final Rule, the Bureau divided Regulation X into subparts and § 1024.13 was located in new ''Subpart B—Mortgage Settlement and Escrow Accounts.'' However, the provisions of § 1024.13(a) are intended to apply with respect to all of Regulation X. Because § 1024.13 applies for all sections of Regulation X, the Bureau proposed to redesignate § 1024.13 as § 1024.5(c), located within ''Subpart A—General Provisions.'' Further, the Bureau proposed to remove and reserve § 1024.13.

The Bureau further proposed to add commentary for proposed § 1024.5(c) to make clear that Regulation X does not create field preemption. Since issuing the 2013 RESPA Servicing Final Rule, the Bureau had received inquiries as to whether Regulation X's mortgage servicing rules result in preemption of the field of mortgage servicing regulation. The Bureau had addressed this question in the preamble to the final rule, stating that ''the Final Servicing Rules generally do not have the effect of prohibiting State law from affording borrowers broader consumer protection relating to mortgage servicing than those conferred under the Final Servicing Rules.''[26] The preamble further stated that, although ''in certain circumstances, the effect of specific requirements of the Final Servicing Rules is to preempt certain limited aspects of state law'' in general, ''the Bureau explicitly took into account existing standards (both State and Federal) and either built in flexibility or designed its rules to coexist with those standards.''[27]

Because the Bureau continued to receive questions on this issue, the Bureau believed it was appropriate to propose commentary to clarify the scope of proposed § 1024.5(c) and expressly address concerns about field preemption. Consistent with the preamble to the 2013 RESPA Servicing Final Rule, proposed comment 5(c)(1)–1 stated that State laws that are in conflict with the requirements of RESPA or Regulation X may be preempted by RESPA and Regulation X. Proposed comment 5(c)(1)–1 stated further that nothing in RESPA or Regulation X, including the provisions in subpart C with respect to mortgage servicers or mortgage servicing, should be construed to preempt the entire field of regulation of the covered practices. This proposed addition to the commentary was meant to clarify that RESPA and Regulation X do not effectuate field preemption of States' regulation of mortgage servicers or mortgage servicing. The comment also made clear that RESPA and Regulation X do not preempt State laws that give greater protection to consumers than do these federal laws.

The Bureau requested comment regarding the addition of the proposed commentary, including whether further clarification regarding the preemption effects of RESPA and Regulation X was necessary or appropriate.

Comments

Numerous consumer and community groups provided similar comments supporting the proposed changes to the Regulation X preemption provision. These commenters supported the relocation of the preemption provision to § 1024.5(c) in the General Provisions subpart and the addition of comment 5(c)(1)–1. Many of these consumer and community groups further suggested that the regulatory text itself be changed to replace the phrase ''settlement practices'' with language more clearly inclusive of servicing activities. Several also requested that an example be included with comment 5(c)(1)–1 showing that a state law more protective of consumers will not be preempted by Regulation X.

Two industry commenters supported the proposed changes to the Regulation X preemption provision. One trade association suggested that the Bureau should promote uniform servicing standards to help create certainty in the market. Another industry commenter stated that the current regulation covered the situation sufficiently and the proposed guidance was unnecessary.

Two trade associations stated that the Bureau was narrowing the existing preemption provision to reduce the likelihood of preemption. One opposed the idea that state laws more protective of consumers are not preempted, and so opposed the inclusion of the comment. The other stated that the preemption provision for mortgage servicing transfers functions statutorily as a general preemption of mortgage servicing.

Several industry commenters pointed out that the statute and regulation use the word ''inconsistent'' when explaining which state laws may be preempted, while the proposed comment uses the more common term ''conflict'' to describe the situation. They suggested that the comment also use the term ''inconsistent'' to avoid confusion.

Final Rule

The relocation of the preemption provision and the guidance in proposed comment 5(c)(1)–1 were not intended to change the current preemption regime under Regulation X and the Bureau does not believe that they do so. The sentence in the regulation that consumer and community groups urged the Bureau to change simply replicates text in RESPA section 18. Therefore the Bureau does not believe that a change to that sentence would be appropriate. Comment 5(c)(1)–1 provides the

[21] 78 FR 6408 (Jan. 30, 2013).

[22] 78 FR 10902 (Feb. 14, 2013).

[23] 78 FR 10696 (Feb. 14, 2013).

[24] 78 FR 4726 (Jan. 22, 2013).

[25] 78 FR 30739 (May 23, 2013).

[26] 78 FR 10706 (Feb. 14, 2013).

[27] *Id.* (specifically identifying the National Mortgage Settlement and the California Homeowner Bill of Rights).

Bureau's official interpretation of that regulatory language. As stated in the proposal, the Bureau believes that the relocation of the preemption provision and the addition of the comment are necessary and appropriate to eliminate any confusion as to how the preemption provision operates. In addition, the Bureau believes that the comment is sufficiently clear and does not consider an example to be necessary.

The final rule adopts the amendments as proposed, but changes the word ''conflict'' in the comment to ''inconsistent'' to avoid confusion.

B. Regulation Z

Section 1026.20 Disclosure Requirements Regarding Post-Consummation Events

20(c) Rate Adjustments With a Corresponding Change in Payment

20(d) Initial Rate Adjustment

Implementation Date. In its proposal, the Bureau did not seek to revise or clarify § 1026.20(c) and (d), the adjustable-rate mortgage (ARM) servicing regulations issued by the Bureau in the 2013 TILA Servicing Final Rule. Nevertheless, the Bureau received unsolicited queries regarding the implementation dates for these rules. Despite the unsolicited nature of these comments, the Bureau believes it would be helpful to clarify the ARM implementation dates.

ARM regulations § 1026.20(c) and (d) generally apply to ARMs originated both prior to and after the January 10, 2014, effective date. However, no servicer is required to comply with the rule until the effective date.

Implementation Date for § 1026.20(d). Because the notice required by § 1026.20(d) must be provided to the consumer between 210 and 240 days before the first payment is due after the initial interest rate adjustment, *servicers will not be required to provide the § 1026.20(d) notice when such payment is due 209 or fewer days from the effective date.* However, payments due 210 or more days from the effective date are subject to the rule.

Implementation Date for § 1026.20(c). Because the notice required by § 1026.20(c) must be provided to the consumer between 60 and 120 days before the first payment is due after an interest rate adjustment causing a corresponding change in payment, *servicers will not be required to provide the § 1026.20(c) notice when such payment is due 25 to 59 days from the effective date.* Note that, under the time frame of current § 1026.20(c), notices are required 25 to 120 days before the first payment is due after the interest rate adjustment. Thus, servicers already will have provided the § 1026.20(c) notices required by the current rule when such payment is due 24 or fewer days from the January 10, 2014, effective date.

Section 1026.35 Requirements for Higher-Priced Mortgage Loans

35(e) Repayment Ability, Prepayment Penalties

The Bureau is concerned that its recently published Amendments to the 2013 Escrows Final Rule [28] requiring industry to comply with certain provisions regarding repayment ability and prepayment penalties for HPMLs could be interpreted as requiring that certain transactions excluded from such requirements are now subject to those requirements. The Bureau believes that the amendments, properly understood, continue the exclusion for such transactions from the requirements. To provide certainty, the Bureau is revising § 1026.35(e) [29] to explicitly exclude from coverage construction and bridge loans and reverse mortgages—loans that were previously explicitly excluded from such requirements, as discussed below.

In January 2013, the Bureau issued the 2013 Escrows Final Rule,[30] which implements certain provisions of the Dodd-Frank Act relating to escrow accounts. That final rule revised the definition of ''higher-priced mortgage loan'' in 12 CFR 1026.35(a) by removing certain exclusions from the scope of consumer credit transactions that may be HPMLs. The loans no longer excluded from the definition of HPML are: Transactions to finance the initial construction of a dwelling (construction loans); temporary or ''bridge loans'' with a terms of twelve months or less, such as a loan to purchase a new dwelling where the consumer plans to sell a current dwelling within twelve months (bridge loans); and reverse mortgages subject to § 1026.33 (reverse mortgages). The Bureau removed these exclusions from the general definition of HPML and located them directly into the individual provisions regarding appraisal, escrow, ability to repay, and prepayment penalty requirements for HPMLs.[31]

Since adopting the above-referenced rules, the Bureau adopted Amendments to the 2013 Escrows Final Rule [32] to prevent the inadvertent and temporary elimination of certain consumer protections for HPMLs concerning ability to repay and prepayment penalties that were codified in 12 CFR 1026.35(b) prior to June 1, 2013. The 2013 Escrows Final Rule took effect June 1, 2013, while the 2013 ATR and HOEPA Final Rules [33] do not take effect until January 10, 2014. Consequently, the existing ability-to-repay and prepayment penalty protections for HPMLs would have been removed, pursuant to the 2013 Escrows Final Rule, over seven months before parallel provisions would take effect. The Amendments to the 2013 Escrows Final Rule restored those protections temporarily in, and re-codified them as part of, newly created 12 CFR 1026.35(e), which took effect June 1, 2013, and will be effective through January 9, 2014.

The Bureau's renumbering of the ability-to-repay and prepayment penalty provisions in § 1026.35(e) of Regulation Z, without excluding reverse mortgages and construction and bridge loans from coverage under that section, could be seen as removing these exclusions from the requirements of that temporary provision. To clarify that the Amendments to the 2013 Escrows Final Rule did not have that effect, the Bureau is revising temporary § 1026.35(e) to explicitly exclude construction loans, bridge loans, and reverse mortgages from its requirements. The Bureau is replacing current § 1026.35(e)(3) with new § 1026.35(e)(3), which states that the requirements of § 1026.35(e) do not apply to construction loans, bridge loans, and reverse mortgages. The Bureau is renumbering current § 1026.35(e)(3), ''Sunset of requirements on repayment ability and prepayment penalties,'' as new § 1026.35(e)(4). The general language in § 1026.35(e) is also revised to reflect the addition of these exclusions. As noted below, the amendment to § 1026.35(e) will apply to any transaction consummated on or after June 1, 2013, for which the creditor receives an application on or before January 9, 2014. Then, at the time § 1026.35(e) expires, the exclusions for construction loans, bridge loans, and reverse mortgages in the 2013 ATR and HOEPA Final Rules will take effect. Thus, the revision of § 1026.35(e) in this

[28] 78 FR 30739 (May 23, 2013).

[29] *Id.*

[30] 78 FR 4726 (Jan. 22, 2013).

[31] *See* § 1026.35(c)(2) of the 2013 TILA Appraisals Rule, 78 FR 10368 (Feb. 13, 2013) (which was adopted by the Bureau, together with several other Federal agencies, as an inter-agency rulemaking); § 1026.35(b)(2) of the 2013 Escrows Final Rule, 78 FR 4727 (Jan. 22, 2013); § 1026.43(a) of the 2013 ATR Final Rule, 78 FR 6408 (Jan. 30, 2013); and § 1026.32(a) of the 2013 HOEPA Final Rule, 78 FR 6856 (Jan. 31, 2013).

[32] 78 FR 30739 (May 23, 2013).

[33] 78 FR 6408 (Jan. 30, 2013); 78 FR 6856 (Jan. 31, 2013), respectively.

final rule will make clear that construction loans, bridge loans, and reverse mortgages have continued and will continue to be excluded from certain HPML requirements regarding prepayment penalties and a consumer's ability to repay the loan.

Legal authority. Construction loans, bridge loans, and reverse mortgages have always been excluded from the requirements of Regulation Z regarding repayment ability and prepayment penalties. The mortgage rules referenced above that implement the Dodd-Frank Act continue to exclude such loans from their requirements, including those governing repayment ability and prepayment penalties. Thus, the revisions to § 1026.35(e) in this final rule are merely technical changes to clarify the temporary provision's consistency with the historical and current treatment of such loans under Regulation Z.

For these reasons, the Bureau is revising temporary amendment § 1026.35(e) to explicitly exclude construction loans, bridge loans, and reverse mortgages from its requirements regarding ability to repay and prepayment penalties for HPMLs, pursuant to its authority to provide for adjustments and exceptions under TILA section 105(a) and (f), and with reliance on the authority used by the Board in amending Regulation Z to include these requirements,[34] including TILA section 129(p). As the Board concluded before it, the Bureau does not believe subjecting these loans to the repayment ability and prepayment penalty requirements would effectuate the purposes of, or facilitate compliance with TILA and Regulation Z. Many of the characteristics of these loans make it inappropriate or unnecessary to apply the repayment ability and prepayment penalty requirements of § 1026.35(e). For example, because the structure of reverse mortgages does not provide for repayment, the requirements related to repayment are not appropriate for such loans. The Bureau also notes that it anticipates undertaking a rulemaking to address how the Dodd-Frank Act title XIV requirements apply to reverse mortgages, and consumer protection issues in the reverse mortgage market may be addressed through such a rulemaking. Thus, the Bureau both interprets § 1026.35(e) not to subject the affected loans to its requirements and also, pursuant to 105(a) and 105(f) of TILA, continues to exclude those loans from the requirements of § 1026.35(e).

Notice and comment are not necessary for this revision of § 1026.35(e), which merely makes explicit in the regulation the Bureau's continuing interpretation that certain loans have been excluded from certain legal requirements throughout the renumbering process. Moreover, the Bureau finds good cause to proceed without notice and comment. 5 U.S.C. 553(b)(B). This revision merely clarifies the operation of the rule that should already have been apparent to many market participants. Notice and comment are therefore unnecessary. In addition, the length of the notice and comment period make it impracticable to correct erroneous interpretations of a rule that is already in effect and that expires within months. For these reasons and under the authority cited above, the Bureau is expressly excluding construction and bridge loans and reverse mortgages from the ability-to-repay and prepayment penalty requirements for HPMLs under interim § 1026.35(e).

Section 1026.41 Periodic Statements for Residential Mortgage Loans

41(a) In General

41(a)(1) Scope

Section 1026.41(a)(1) of the 2013 TILA Servicing Final Rule addresses the scope of the mortgage loans subject to the periodic statement requirements, stating that the rule applies to closed-end consumer credit transactions secured by a dwelling, subject to certain exemptions set forth in § 1026.41(e). It goes on to say that, for purposes of § 1026.41, ''such transactions are referred to as *mortgage loans.''*

To eliminate any confusion as to which loans ''such transactions'' refers, and thus to which loans the periodic statement rule applies, the Bureau proposed to clarify § 1026.41(a)(1). The proposed revision would have replaced the indefinite reference ''such transactions'' in § 1026.41(a)(1) with a reiteration of the loans to which the rule applies, that is, closed-end consumer credit transactions secured by a dwelling. This revision would have clarified which transactions are considered ''mortgage loans'' for purposes of § 1026.41.

The proposal stated that the Bureau believed this change also would reduce uncertainty about which loans to consider in determining a servicer's eligibility for one of the exemptions under § 1026.41(e), the small servicer exemption. Section 1026.41(e)(4)(ii) defines a small servicer as a servicer that services 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee.[35] The Bureau reasoned that the proposed text would have clarified that, in general, a servicer determines whether it is a small servicer by considering the closed-end consumer credit transactions secured by a dwelling that it services—including coupon book loans, which are exempt from some of the requirements of the periodic statement rule. The proposal noted that, pursuant to proposed § 1026.41(e)(4)(iii), reverse mortgages and transactions secured by consumers' interests in timeshares, which are exempt from all of the requirements of § 1026.41, would be excluded from consideration for purposes of determining small servicer status.

The Bureau received no comments on its proposed change to the regulatory text of § 1026.41(a)(1) and therefore is adopting it as proposed. The Bureau did, however, receive comments regarding the mortgage loans covered by the small servicer exemption, and those comments are discussed below in the sections specifically addressing the small servicer exemption.

41(e) Exemptions

41(e)(4) Small Servicers

41(e)(4)(ii) Small Servicer Defined

The Proposal

The proposed rule explained that, for the reasons set forth in the 2013 Servicing Final Rules,[36] the Bureau determined that it was appropriate to exempt small servicers from certain mortgage servicing requirements. The proposal set forth the rules from which small servicers, as defined by § 1026.41(e)(4), are exempt: the Regulation Z requirement to provide periodic statements for residential mortgage loans[37] and, in Regulation X, (1) certain requirements relating to obtaining force-placed insurance,[38] (2) the general servicing policies, procedures, and requirements,[39] and (3) certain requirements and restrictions relating to communicating with borrowers about, and evaluation of applications for, loss mitigation options.[40]

Scope and application of the small servicer exemption. The Bureau's proposal would have clarified the scope and application of the small servicer

[34] 73 FR 44522 (July 30, 2008).

[35] The proposal stated that Housing Finance Agencies are deemed small servicers under § 1026.41(e)(4)(ii)(B) regardless of loan count and loan ownership status.

[36] *See, e.g.,* 78 FR 10718–10720 (Feb. 14, 2013).

[37] 12 CFR 1026.41(e).

[38] 12 CFR 1024.17(k)(5).

[39] 12 CFR 1024.30(b)(1).

[40] *Id.*

exemption. The proposal stated that determination of a servicer's status as a small servicer, and thus its eligibility for the small servicer exemption, is set forth in § 1026.41(e)(4) and that, as set forth above, this standard is applicable by cross-reference to certain provisions of Regulation X. The proposal pointed out that Regulation X applies to ''federally related mortgage loans,'' which excludes certain loans that are ''mortgage loans'' as defined by Regulation Z § 1026.41(a)(1). The proposed revision would have clarified that, to qualify for the small servicer exemption applicable to either rule, the servicer must qualify as a small servicer under § 1026.41(a)(1)—a determination based on closed-end consumer credit transactions secured by a dwelling. The proposal would have clarified that this Regulation Z standard applies regardless of whether or not the loans considered are subject to the requirements of Regulation X. The Bureau noted in the proposal that, although some mortgage loans not subject to coverage under Regulation X are considered for purposes of determining eligibility as a small servicer, servicing such loans under Regulation X rules would not be required. Thus, the Bureau posited, a servicer that services 5,000 *federally related mortgage loans,* as defined by Regulation X, may service more than 5,000 *mortgage loans,* as defined by Regulation Z § 1026.41(a)(1). The Bureau went on to explain that, in such a case, because the servicer's loans exceed the 5,000 mortgage loan limit, the servicer is not a small servicer and, thus, would not qualify for the small servicer exemption with regard to Regulation Z and Regulation X. The proposal reiterated that the servicer would not have to comply with Regulation X requirements for those mortgage loans counted for purposes of determining small servicer eligibility but which are not federally related mortgage loans. The proposal stated that by clarifying how a servicer determines whether it qualifies as a small servicer with regard to Regulation Z, the proposal also would have clarified how a servicer determines whether it qualifies for the small servicer exemptions from the applicable mortgage servicing requirements in Regulation X.

To ensure understanding of the small servicer exemption, the Bureau proposed to amend the commentary to § 1026.41(e)(4)(ii) to specifically identify which mortgage loans are considered for purposes of determining eligibility for the small servicer exemption. To this end, the Bureau proposed to add comment 41(e)(4)(ii)–1, which would have clarified that, in general and pursuant to § 1026.41(a)(1), the mortgage loans considered in determining qualification for the small servicer exemption are closed-end consumer credit transactions secured by a dwelling. Proposed comment 41(e)(4)(ii)–1 also would have highlighted that, pursuant to § 1026.41(e)(4)(iii), certain closed-end consumer credit transactions secured by a dwelling are not considered in determining status as a small servicer, as discussed further below in connection with proposed § 1026.41(e)(4)(iii).

The Bureau requested comments and data regarding whether proposed comment 41(e)(4)(ii)–1 would appropriately clarify the scope of mortgage loans that must be considered for determining if a servicer qualifies as a small servicer. The Bureau specifically requested comment and data regarding whether any servicers service a significant number of closed-end consumer credit transactions secured by a dwelling, which are subject to Regulation Z, but service significantly fewer ''federally related mortgage loans,'' which are subject to Regulation X. By way of example, the Bureau requested comment and data regarding whether any servicers would not be considered a small servicer if the small servicer exemption were based on whether a servicer services 5,000 or fewer closed end consumer credit transactions secured by a dwelling, but would be a small servicer if the small servicer exemption were based on whether a servicer services 5,000 or fewer ''federally related mortgage loan[s],'' as that term is defined in 12 CFR 1024.2. The proposal provided a specific example in a footnote of a servicer that services 10,000 construction loans, which are not considered ''federally related mortgage loans'' pursuant to 12 CFR 1024.2, and 100 mortgage loans that are considered ''federally related mortgage loans'' pursuant to 12 CFR 1024.2.[41] Such a servicer, the Bureau stated, would be considered to service 10,100 closed-end consumer credit transactions secured by a dwelling and would not qualify for the small servicer exemption. The proposal, however, underscored the fact that, in any case, only the 100 federally related mortgage loans serviced by the servicer would be subject to the mortgage servicing requirements set forth in Regulation X pursuant to 12 CFR 1024.31.

[41] 78 FR 25638, 25642 n.27 (May 2, 2013).

Comments

In response to its request for comment, the Bureau received several comments expressing general support for its proposed clarification of the scope of loans to consider in determining whether a servicer is a small servicer, and received no comments opposing the proposed clarification. Nor did the Bureau receive any data or comment with regard to servicers servicing a disproportionate number of federally related mortgage loans, as defined by Regulation X, compared to the number of ''mortgage loans'' they service, as defined by Regulation Z.

The Bureau also received a number of comments that were beyond the scope of the proposal. Three national trade associations urged the Bureau to revise the rule itself so that more servicers could qualify for the small servicer exemption, but provided no data or reasoning in support of this position. Similarly, a credit union trade association recommended that the Bureau revise the rule to consider only ''federally related mortgage loans'' instead of the more inclusive ''mortgage loans,'' as defined by the rule, but likewise provided no supporting data or reasoning. A trade association representing community banks generally urged the Bureau to reduce the loan pool used to determine small servicer status by limiting it to ''federally related mortgage loans'' and, in the alternative, specifically recommended carving out construction loans—one of the categories of loans not included in the definition of ''federally related mortgage loans''—from the category of ''mortgage loans.'' The trade association set forth reasons why construction loans require less oversight than other mortgage loans. Finally, a trade association representing home builders voiced concern that the proposal's reference to construction loans in the footnote example might cause ''confusion'' which could result in community banks reducing their construction loan portfolio to preserve their small servicer status. To avoid this possibility, the trade association recommended excluding construction loans from the loans considered in determining small servicer status.

Final Rule

As stated above in section I, this final rule generally does not address comments not directly related to the clarifications and revisions proposed by the rule. Absent opposition or responsive comments and in view of the support the Bureau received for its proposed clarification that the scope of loans considered in determining small servicer status are mortgage loans, as defined by § 1026.41, the Bureau is adopting comment 41(e)(4)(ii)–1 as proposed and declines to revise § 1026.41 with regard to the scope of loans considered in determining small servicer status.

The Proposal

Affiliate and master/subservicer relationships. The Bureau also proposed to amend § 1026.41(e)(4)(ii)(A), which states that a small servicer is a servicer that ''services 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee.'' Proposed § 1026.41(e)(4)(ii)(A) would have provided clarification that, for purposes of determining small servicer status, a servicer considers the mortgage loans it services *together with any mortgage loans serviced by any affiliates.* This change, the Bureau explained, would conform that section with § 1026.41(e)(4)(iii), which states that small servicer status is determined by counting ''the number of mortgage loans serviced by the servicer and any affiliates as of January 1 for the remainder of the calendar year.'' To avoid any risk of inconsistency, the Bureau believed it would have been appropriate to amend § 1026.41(e)(4)(ii)(A) to conform the language to § 1026.41(e)(4)(iii) by adding the clause ''together with any affiliates'' such that a small servicer is a servicer that ''services, *together with any affiliates,* 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee.'' As stated in the proposal, this change would more fully conform the language of § 1026.41(e)(4)(ii)(A) with the language of § 1026.41(e)(4)(iii) but would not change the meaning of the small servicer exemption.

The Bureau also proposed to amend the comments to § 1026.41(e)(4)(ii)(A). Specifically, comment 41(e)(4)(ii)–1 would have been redesignated as comment 41(e)(4)(ii)–2 and would have been amended to clarify several elements set forth in the 2013 TILA Servicing Final Rule. First, it would have clarified that there are two concurrent requirements for determining whether a servicer is a small servicer, as discussed further below. Second, it would have explained that the mortgage loans considered in making this determination are those serviced by the servicer as well as by its affiliates. Finally, it would have clarified that the second requirement of the small servicer test, that a servicer must be either the ''creditor or assignee'' of the mortgage loans it services, means that the servicer must either currently own or have originated all of the mortgage loans it services. The comment also would have provided examples to illustrate these points.

Proposed comment 41(e)(4)(ii)–2 would have set forth the two requirements for determining if a servicer is a small servicer and would have clarified that both requirements apply to the mortgage loans serviced by the servicer as well as by its affiliates. The comment would have set forth both requirements: (1) A servicer, together with its affiliates, must service 5,000 or fewer mortgage loans, and (2) the servicer must only service mortgage loans for which the servicer (or an affiliate) is the creditor or assignee. Proposed comment 41(e)(4)(ii)–2 further would have clarified that to be the ''creditor or assignee'' of a mortgage loan, the servicer (or an affiliate) must either currently own the mortgage loan or must have been the entity to which the mortgage loan was initially payable. It also would have clarified that a servicer that only services such mortgage loans may qualify as a small servicer so long as the servicer also only services 5,000 or fewer mortgage loans. The Bureau stated that it believed that this clarification would provide a helpful alternative way of expressing the requirement stated in the rule that the servicer or affiliate must also be the creditor or assignee of a mortgage loan.

Proposed comment 41(e)(4)(ii)–2 also would have provided examples of specific circumstances demonstrating these requirements. The first example would have illustrated the effect affiliation has on the loan count requirement of the small servicer test. Proposed comment 41(e)(4)(ii)–2.i stated that if a servicer services 3,000 mortgage loans, but is affiliated (as defined at § 1026.32(b)(2)) [42] with another servicer that services 4,000 other mortgage loans, both servicers are considered to service 7,000 mortgage loans and neither servicer is considered a small servicer. The second example would have illustrated the ownership requirement of the small servicer test. Proposed comment 41(e)(4)(ii)–2.ii stated that if a servicer services 3,100 mortgage loans, including 100 mortgage loans it neither owns nor originated but for which it owns the mortgage servicing rights, the servicer is not a small servicer. The proposal explained that this is because the servicer services some mortgage loans for which the servicer (or an affiliate) is not the creditor or assignee, notwithstanding that the total number of mortgage loans serviced is fewer than 5,000.

Finally, the Bureau proposed to redesignate comment 41(e)(4)(ii)–2 as 41(e)(4)(ii)–3 and to revise the comment so that it would provide further clarification regarding the application of the small servicer exemption in certain master servicer/subservicer relationships. Under the 2013 TILA Servicing Final Rule, the Bureau explained, comment 41(e)(4)(ii)–2 references Regulation X, 12 CFR 1024.31, for the definitions of ''master servicer'' and ''subservicer'' that apply to the rule. It also provided an example demonstrating that even though a master servicer meets the definition of a small servicer, a subservicer retained by that master servicer that does not meet the definition does not qualify for the small servicer exemption.

Proposed comment 41(e)(4)(ii)–3 would have clarified that a small servicer does not lose its small servicer status because it retains a subservicer, as that term is defined in 12 CFR 1024.31, to service any of its mortgage loans. The comment also would have clarified that, for a subservicer, as that term is defined in 12 CFR 1024.31, to gain the benefit of the small servicer exemption, both the master servicer and the subservicer must be small servicers. The comment also would have pointed out that, generally, a subservicer will not qualify as a small servicer because it does not own or did not originate the mortgage loans it subservices. However, the comment went on to state, a subservicer would qualify as a small servicer if it is an affiliate of a master servicer that qualifies as a small servicer.

Proposed comment 41(e)(4)(ii)–3 also would have removed the example in 2013 TILA Servicing Rule comment 41(e)(4)(ii)–2 described above in favor of three other examples that would have demonstrated the implication of a master servicer/subservicer relationship for purposes of qualifying for the small servicer exemption. In the first proposed example, a credit union services 4,000 mortgage loans—all of which it originated or owns. The credit union retains a credit union service organization to subservice 1,000 of the mortgage loans and the credit union services the remaining 3,000 mortgage loans itself. The credit union has no affiliation relationship with the credit union service organization. The credit

[42] The definition of ''affiliate'' for purposes of subpart E of Regulation Z, which includes § 1026.41, is set forth in § 1026.32(b)(2) and applies to all of subpart E, including the small servicer exemption. Affiliate, as defined in § 1026.32(b)(2), ''means any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C 1841 *et seq.*).''

union is a small servicer and, thus, the small servicer exemption applies to the 3,000 mortgage loans the credit union services itself. The credit union service organization is not a small servicer because it services mortgage loans it does not own or did not originate. Accordingly, the credit union service organization does not gain the benefit of the small servicer exemption and, thus, must comply with any applicable mortgage servicing requirements for the 1,000 mortgage loans it subservices.

Proposed comment 41(e)(4)(ii)–3.ii would have posited the example of a bank holding company that, through a lender subsidiary, owns or originated 4,000 mortgage loans. In the example, all mortgage servicing rights for the 4,000 mortgage loans are owned by a wholly owned master servicer subsidiary. Servicing for the 4,000 mortgage loans is conducted by a wholly owned subservicer subsidiary. The bank holding company controls all of these subsidiaries and, thus, they are affiliates of the bank holding company pursuant § 1026.32(b)(2). Because the master servicer and subservicer service 5,000 or fewer mortgage loans and because the mortgage loans are owned or originated by an affiliate of each, the master servicer and the subservicer are each considered a small servicer and qualify for the small servicer exemption for all 4,000 mortgage loans.

Proposed comment 41(e)(4)(ii)–3.iii would have posited the example of a nonbank servicer that services 4,000 mortgage loans, all of which it originated or owns. The servicer retains a ''component servicer'' to assist it with servicing functions. The component servicer is not engaged in ''servicing'' as defined in 12 CFR 1024.2; that is, the component servicer does not receive any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts, and does not make the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. In this proposed example, the component servicer is not a subservicer pursuant to 12 CFR 1024.31 because it is not engaged in servicing, as that term is defined in 12 CFR 1024.2. The nonbank servicer is a small servicer and the small servicer exemption applies to all 4,000 mortgage loans it services.

Comments

Many commenters expressed their appreciation for the Bureau's clarification of the affiliate and master/subservicer relationships. Among them, a trade association representing the banking industry noted that the proposed clarification of the affiliate relationship was consistent with the regulation as issued by the Bureau. Several commenters submitted comments outside the scope of this rulemaking recommending that the Bureau reconsider altogether the inclusion of affiliate loans in determining eligibility for the small servicer exemption. A trade association representing credit union service organizations (CUSOs), a national and state trade association representing credit unions, and two individual credit unions raised concerns that the affiliate relationships some CUSOs have with one or more credit unions would prevent those CUSOs (and their credit union affiliates) from qualifying for the small servicer exemption. (The proposed example clarifying the master/subservicer relationship included a CUSO that was not an affiliate.) These commenters recommended that the Bureau either revise the rule to remove affiliates and their mortgage loans from consideration in determining small servicer status or that the Bureau provide clarification regarding how to take into account the loans of CUSO affiliates that are not wholly-owned by credit unions or of CUSOs with multiple owners. Two of the commenters explained that many credit unions have an affiliate relationship with a CUSO to facilitate mortgage lending and borrowing. The trade associations noted the many cases of multiple credit unions affiliating with a single CUSO in order to achieve economies of scale and to maintain competitiveness in the marketplace. They indicated that these arrangements are particularly important for small credit unions with limited capacity. The trade association representing CUSOs voiced concern that the affiliate requirement in § 1026.41 could have a chilling effect on the mortgage CUSO industry by encouraging credit unions to divest their interests in CUSOs to maintain their small servicer exemption or by discouraging credit unions that qualify as small servicers from investing in an affiliate relationship with a CUSO.

Final Rule

In view of the comments supporting the proposed clarification of affiliate and master/subservicer relationships with regard to small servicer qualification and in the absence of responsive comments to the contrary, the Bureau is adopting the clarifications as proposed. With respect to the comments outside the scope of this rulemaking recommending that the Bureau exclude the mortgage loans of affiliates from consideration in determining small servicer status, the Bureau declines to revise the rule. In addition to the fact that reopening consideration of a major policy decision would require notice and comment relatively late in the implementation process, the Bureau continues to believe that the reasons underlying the rule as set forth in the 2013 Servicing Final Rules are persuasive on the merits.

For clarification with regard to CUSOs and their relationships with one or more credit unions, the Bureau directs both the CUSOs and the credit unions to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) to determine whether their particular business relationships constitute affiliate relationships.[43] For further clarification, the Bureau notes that, pursuant to the affiliate requirement in § 1026.41, in any affiliate relationship with a CUSO, the total number of the mortgage loans of the affiliated entities must be considered in determining small servicer status. For example, for a credit union and its CUSO affiliate, the total number of mortgage loans serviced by both entities must be considered to determine the small servicer status for both the credit union and the CUSO.[44] The same is true for credit unions that are deemed affiliates under the Bank Holding Company Act of 1956.

41(e)(4)(iii) Small Servicer Determination

Section 1026.41(e)(4)(iii) of the 2013 TILA Servicing Final Rule sets forth certain criteria regarding how to determine if a servicer qualifies as a small servicer. In addition, that section explains that small servicer determination is based on the number of mortgage loans serviced by the servicer and any affiliates as of January 1 for the remainder of the calendar year. It also specifies that a servicer that ''crosses the threshold,'' and thus loses its small

[43] Pursuant to § 1026.32(b)(2), § 1026.41 is subject to the definition of ''affiliate'' as set forth in the Bank Holding Company Act of 1956 (the Act). *See* proposed comment 41(e)(4)(ii)–3.ii. Under the Act, ''affiliate'' is defined as any company that controls, is controlled by, or is under common control with another company. The percentage of control is a determining factor in whether an affiliate relationship exists. The Bureau notes that, absent other determining factors, if a credit union's percentage of control over a CUSO falls below the statutory minimum, there would be no affiliate relationship.

[44] For the small servicer status of a credit union/master servicer and the small servicer status of its *unaffiliated* CUSO/subservicer, see proposed comment 41(e)(4)(ii)–3.i, which the Bureau is adopting as proposed in this final rule.

servicer status and its small servicer exemption, has six months after crossing the threshold or until the next January 1, whichever is later, to comply with any requirements from which the servicer is no longer exempt.

The Proposal

To provide clarification regarding the date for determining small service status and when a servicer that loses small servicer status must begin to comply with regulations from which it had been exempt, and that those dates apply to both elements of the small servicer exemption (loan count and ownership status), proposed § 1026.41(e)(4)(iii) included a number of revisions to the 2013 TILA Servicing Final Rule § 1026.41(e)(4)(iii). First, proposed § 1026.41(e)(4)(iii) would have replaced the reference to a servicer that ''crosses the threshold'' for determining if the servicer qualifies as a small servicer with broader language indicating that a servicer that ''ceases to qualify'' as a small servicer will have six months or until the next January 1, whichever is later, to comply with any requirements for which a servicer is no longer exempt as a small servicer. The Bureau stated it believed that the broader phrase ''ceases to qualify'' would more accurately reflect the fact that there are two elements to determining if a servicer qualifies as a small servicer and pointed to the discussion above to underscore that either one of these elements could cause a servicer to lose exempt status.

Proposed § 1026.41(e)(4)(iii) therefore would have applied the transition period set out in the rule to situations in which a servicer no longer meets the loan count requirement as well as to situations in which the servicer no longer meets the requirement that the servicer is the creditor or assignee of all mortgage loans it services. Thus, the proposal stated, if a servicer exceeds the 5,000 mortgage loan limit or begins to service mortgage loans it does not own or did not originate, it must comply with any requirements from which it is no longer exempt by either the following January 1 or six months after the change in operations that disqualifies it as a small servicer, whichever is later. The proposal would have provided the example that, if on September 1 a servicer that previously qualified as a small servicer begins to service a mortgage loan that it does not own and did not originate, the servicer has until March 1 of the following year to comply with the requirements from which it was previously exempt as a small servicer.

Comments and Final Rule

The Bureau did not receive any responsive comments regarding the proposed clarifications discussed above, outside of general support for providing clarification regarding this issue. In order to clarify the timing provision, the Bureau is adopting the changes as proposed.

In this final rule, the Bureau also is revising a comment to § 1026.41(e)(4)(iii) that provides three examples of the timing for when a small servicer is no longer considered a small servicer and when that former small servicer must start complying with any requirements from which it previously was exempt as a small servicer. The Bureau is revising comment 41(e)(4)(iii)–2 to maintain consistency with and further clarify the changes to the regulatory text the Bureau is adopting in § 1026.41(e)(4)(iii), as discussed above.

To this end, the Bureau is revising the heading of comment 41(e)(4)(iii)–2. The Bureau is removing the reference to ''threshold'' and is amending the heading to read: ''*Timing for small servicer exemption''* for the same reasons discussed above and to maintain consistency with the adopted regulatory changes to § 1026.41(e)(4)(iii). In addition, the Bureau is amending the examples in the comment to conform to and further clarify the changes the Bureau is adopting in the regulatory text. The first of the current examples states that a servicer that begins servicing more than 5,000 loans on October 1 and is servicing more than 5,000 loans as of January 1 of the following year would no longer be considered a small servicer on April 1 of that following year. The second current example states that a servicer that begins servicing more than 5,000 mortgage loans on February 1, and services more than 5,000 loans as of January 1 of the following year, would no longer be considered a small servicer on January 1 of that following year. The third example states that a servicer that begins servicing more than 5,000 mortgage loans on February 1, but services less than 5,000 loans as of January 1 of the following year, is considered a small servicer for that following year.

The revised examples clarify two points. The first point is that the application of the calendar dates apply to both elements of the small servicer test, *i.e.,* exceeding the allowable maximum number of loans serviced *and* servicing mortgage loans a servicer either does not own or did not originate. The second point of clarification is that January 1 is the date used to determine whether or not a servicer is considered a small servicer and the other dates (the latter of six months from the time the servicer ceases to be a small servicer or until the next January 1) are used to determine when a small servicer that has lost its small servicer status must begin complying with the regulations for which it had been exempt.

The first revised example explains that a small servicer that begins servicing more than 5,000 mortgage loans (or begins servicing one or more mortgage loans it does not own or did not originate) on October 1 and is servicing 5,000 mortgage loans (or services one or more mortgage loans it does not own or did not originate) as of January 1 of the following year, would no longer be considered a small servicer on January 1 of that following year and would have to comply with any requirements from which it is no longer exempt as a small servicer on April 1 of that following year. The second revised example states that a small servicer that begins servicing more than 5,000 mortgage loans (or begins servicing one or more mortgage loans it does not own or did not originate) on February 1, and services more than 5,000 mortgage loans (or begins servicing one or more mortgage loans it does not own or did not originate) as of January 1 of the following year, would no longer be considered a small servicer on January 1 of that following year and would have to comply with any requirements from which it is no longer exempt as a small servicer on that same January 1. The third revised example states that a servicer that begins servicing more than 5,000 mortgage loans (or begins servicing one or more mortgage loans it does not own or did not originate) on February 1, but services less than 5,000 mortgage loans (or no longer services mortgage loans it does not own or did not originate) as of January 1 of the following year, is considered a small servicer for that following year. In sum, the amended heading and examples conform to and provide further clarification of the proposed changes to the regulatory text discussed above that the Bureau is adopting in this final rule.

The Proposal

Consideration of loans serviced. The proposed rule also would have added language to § 1026.41(e)(4)(iii) to specify which mortgage loans should not be considered in determining small servicer status. Proposed § 1026.41(e)(4)(iii) would have clarified that certain closed-end consumer credit transactions secured by a dwelling would not be considered for purposes of determining whether a servicer qualifies as a small servicer. Specifically, the proposal went on to explain, because reverse mortgage transactions and mortgage loans secured by a consumer's interest in timeshare plans are exempt from § 1026.41, such loans are not considered when determining if a servicer is a small servicer. The proposed rule also would have clarified that, because coupon book loans are exempt only from some requirements of § 1026.41, such loans must be considered in determining whether a servicer is a small servicer.

The proposal also would have excluded from consideration in connection with the small servicer exemption, any mortgage loan voluntarily serviced by a servicer for a creditor or assignee that is not an affiliate of the servicer and for which the servicer does not receive any compensation or fees (''charitably serviced'' mortgage loans). The Bureau explained that it had received feedback that certain servicers that otherwise would be considered small servicers voluntarily service mortgage loans for unaffiliated nonprofit entities for charitable purposes and do not receive compensation or fees from engaging in that servicing. The Bureau further explained that, if such charitably serviced mortgage loans were considered in connection with determining whether a servicer qualifies as a small servicer, a servicer engaging in this practice would not qualify for the small servicer exemption because the servicer would be servicing a mortgage loan it does not own or did not originate, notwithstanding that such servicer undertook to service those mortgage loans for charitable purposes.

The Bureau expressed concern that including charitably serviced mortgage loans in determining small servicer status would cause servicers to refrain from charitable servicing rather than lose the benefits of a small servicer exemption. The Bureau stated its belief that such a result would not further the goal of consumer protection for the affected consumers and might instead negatively affect the availability and costs of credit for consumers whose mortgage loans would otherwise be serviced pursuant to such charitable arrangements. Further, the Bureau believed that consumers would be more likely to receive superior service from an entity in the business of servicing that is willing to donate its services than they would if nonprofit entities that are not experienced in the business of servicing were forced to take on those duties themselves. Finally, the Bureau stated that it believed that the benefits of excluding charitably serviced mortgage loans from small servicer determination would outweigh the potential risks to consumers that exclusion may pose.

The Bureau proposed that, for the reasons set forth above and pursuant to the Bureau's exemption authority and authority to provide for adjustments and exceptions for any class of transactions as may be necessary or proper to effectuate the purposes of TILA, under TILA sections 105(a) and (f), mortgage loans voluntarily serviced by a servicer for a creditor or assignee that is not an affiliate of the servicer and for which the servicer does not receive any compensation or fees would not be considered in determining a servicer's qualification as a small servicer. The Bureau stated that it believed that considering such loans in determining if a servicer is a small servicer would defeat the purposes of TILA by penalizing charitable servicers, thereby dissuading them from engaging in charitable servicing to the detriment of the consumers that otherwise would benefit from this activity. The Bureau requested comment regarding whether it would be appropriate not to consider such mortgage loans when determining if a servicer qualifies for the small servicer exemption. The Bureau further requested comment on whether other mortgage loans serviced through similar limited arrangements should not be considered in determining whether a servicer is a small servicer. The Bureau emphasized in its proposed rule that it was neither reexamining nor seeking comment on the issue of exempting nonprofit entities engaged in mortgage servicing from the requirements of the periodic statement or any other mortgage servicing rule.

Finally, the Bureau proposed to add comment 41(e)(4)(iii)–3. Proposed comment 41(e)(4)(iii)–3 would have clarified that mortgage loans that are not considered for purposes of determining small servicer qualification pursuant to § 1026.41(e)(4)(iii), are not considered for determining either whether a servicer services, together with any affiliates, 5,000 or fewer mortgage loans or whether a servicer is servicing mortgage loans that it does not own or did not originate. Proposed comment 41(e)(4)(iii)–3 further would have posited the example of a servicer that services a total of 5,400 mortgage loans, of which the servicer owns or originated 4,800 mortgage loans, services 300 reverse mortgage transactions that it does not own or did not originate, and voluntarily services 300 mortgage loans that it does not own or did not originate for an unaffiliated nonprofit organization for which the servicer does not receive any compensation or fees. The example stated that neither the reverse mortgage transactions nor the mortgage loans voluntarily serviced by the servicer are considered for purposes of determining if the servicer is a small servicer. The example concluded that, because the only mortgage loans considered are the 4,800 other mortgage loans serviced by the servicer, and the servicer owns or originated each of those mortgage loans, the servicer is considered a small servicer and qualifies for the small servicer exemption with regard to all 5,400 mortgage loans it services. The comment also would have noted that reverse mortgages and transactions secured by a consumer's interest in timeshare plans, in addition to not being considered in determining small servicer qualification, also are *exempt* from the requirements of § 1026.41. In contrast, the proposed comment noted, although charitably serviced mortgage loans, as defined by § 1026.41(e)(4)(iii), are likewise not considered in determining small servicer qualification, they are *not exempt* from the requirements of § 1026.41. The comment thus would have clarified that a servicer that does *not* qualify as a small servicer would not be required to provide periodic statements for reverse mortgages and timeshare plans because they are exempt from the rule, but would be required to provide periodic statements for the mortgage loans it charitably services.

Legal authority. The Bureau proposed to exclude charitably serviced mortgage loans and reverse mortgage transactions from consideration in determining a servicer's status as a small servicer for purposes of the small servicer exemption in § 1024.41(e)(4) pursuant to its authority to provide for adjustments and exceptions under TILA section 105(a) and (f).[45] The proposal went on to say that, with respect to charitably serviced mortgage loans, the Bureau believed, for the reasons described above, that declining to consider such mortgage loans for purposes of determining eligibility as a small servicer would effectuate the purposes of, and would facilitate compliance with TILA and Regulation Z. The proposal further stated that, consistent with TILA

[45] The proposal stated that TILA section 128(f) requires periodic statements for ''residential mortgage loans,'' which, pursuant to TILA section 103(cc)(5), excludes transactions secured by consumers' interests in timeshare plans. For this reason, the proposed rule said, exception authority is not required to exclude such loans from consideration in determining if a servicer is a small servicer.

section 105(f) and in light of the factors in that provision, the Bureau believed that requiring servicers to consider mortgage loans they charitably service for purposes of determining eligibility as a small servicer would cause mortgage servicers to withdraw from such charitable relationships and not provide a meaningful benefit to consumers in the form of useful information or protection. In addition, the Bureau expressed its concern regarding the extent to which any requirement to consider such loans would complicate, hinder, or make more expensive the credit process for such mortgage loan transactions, especially considering the status of the borrowers that typically secure mortgage loans that are charitably serviced. The Bureau said that ultimately it believed the goal of consumer protection would be undermined if it were to consider, for purposes of small servicer qualification, mortgage loans voluntarily serviced by a servicer for a creditor or assignee that is not an affiliate of the servicer and for which the servicer does not receive any compensation or fees.

In the proposed rule, the Bureau said it similarly believed that not considering reverse mortgages in determining whether a servicer is a small servicer would effectuate the purposes of, and would facilitate compliance with, TILA and Regulation Z. The Bureau said it believed this for the same reasons set forth in the 2013 TILA Servicing Final Rule [46] exempting reverse mortgages from the requirements of § 1026.41. The Bureau pointed to the discussion in that final rule that the periodic statement requirements were designed for a traditional mortgage product and that information relevant and useful for consumers with reverse mortgages differs substantially from the information required on the periodic statement and, thus, would not provide a meaningful benefit to consumers of reverse mortgages. Finally, the proposal put forth the Bureau's belief that not considering reverse mortgages in determining whether a servicer is a small servicer is proper irrespective of the amount of the loan, the status of the consumer (including related financial arrangements, financial sophistication, and the importance to the consumer of the loan), or whether the loan is secured by the principal residence of the consumer.

Comments and Final Rule

The Bureau received only positive comments regarding its proposed clarification that reverse mortgage transactions and mortgage loans secured by a consumer's interest in timeshare plans, which are exempt from all provisions of § 1026.41, are excluded from the loan pool used to determine eligibility for the small servicer exemption. However, one national trade association representing credit unions contested the Bureau's clarification that fixed-rate loans with coupon books must be considered for purposes of determining eligibility for the small servicer exemption. The commenter said that including fixed-rate loans with coupon books in the loan pool used to determine small servicer status but excluding them from the requirement to provide periodic statements would create confusion without providing adequate benefits. The Bureau disagrees and notes, as discussed above, that fixed-rate loans with coupon books are exempt only from some of the requirements of § 1026.41—as opposed to reverse mortgage transactions and mortgage loans secured by a consumer's interest in timeshare plans which are not subject to any of the requirements of § 1026.41. Servicers servicing fixed-rate loans with coupon books are exempt from the requirement to provide periodic statements for these loans under § 1026.41, but servicers nevertheless have to provide to consumers with such loans the information contained in the periodic statement, either in the coupon book or in some other form. Because servicers servicing fixed-rate loans with coupon books must comply with the requirements of § 1026.41 regarding those mortgage loans, it is appropriate that such loans would be considered in determining whether such servicers are small servicers and therefore exempt from complying with the requirements of § 1026.41 with regard to those loans. Conversely, it is appropriate to exclude reverse mortgage transactions and mortgage loans secured by a consumer's interest in timeshare plans from the loan pool used to determine small servicer status because, regardless of that servicer's small servicer status, there is no requirement for the servicer to comply with any of the requirements of § 1026.41 with regard to those loans.

The Bureau received strong support for its proposed revision of § 1026.41 to exclude charitably serviced loans from consideration in determining whether a servicer qualifies as a small servicer, that is, mortgage loans voluntarily serviced for a non-affiliate creditor or assignee and for which the servicer does not receive any compensation or fees. Commenters agreed that, absent the Bureau's proposal, small servicers likely would relinquish their volunteer efforts in order to preserve their small servicer status. In response to one commenter's request for clarification, the Bureau notes that its proposed revision of the rule with regard to volunteer servicing is not limited to the servicing of mortgage loans owned or originated by nonprofit organizations, although the Bureau suspects that most charitable servicing is done on behalf of such organizations. Due to the support received by the Bureau for its proposed revision of § 1026.41(e)(4)(iii)(A) excluding charitably serviced mortgage loans from the loan pool used to determine small servicer eligibility, and for the reasons stated above, the Bureau is adopting the revision as proposed.

In addition to requesting comment regarding the appropriateness of excluding charitably serviced mortgage loans when determining small servicer status, the proposal solicited comment on whether other mortgage loans serviced through similar limited arrangements should not be considered in determining whether a servicer is a small servicer. The Bureau did not receive comments recommending that any other servicing arrangements be excluded from consideration for purposes of determining small servicer status. The Bureau did receive a comment outside of the scope of the proposal from a national trade association requesting guidance regarding the trade association's conclusion that certain depository services some of its members provide for depositors who self-finance the sale of residential real estate do not qualify as "servicing," as defined in 12 CFR 1024.2(b). The trade association explained that, for a minimal fee, some banks—usually small banks—receive mortgage payments from a borrower and deposit the funds into that customer's account. According to the trade association, the agreement between the bank and the depositor/creditor typically excludes any other services, such as providing servicing in the case of delinquency. The trade association expressed concern that small institutions will discontinue this service for their depository customers who owner-finance the sale of real property for fear of losing their small servicer status if the depository service could be construed as servicing mortgage loans that the bank does not own or did not originate.

Because the comment was outside the scope of the proposal, the Bureau declines to provide the requested guidance. Moreover, even if the comment were within the scope of the proposal, the Bureau is not able to

[46] *See* 78 FR 10901, 10973 (Feb. 14, 2013).

provide guidance at this juncture because the trade association did not provide sufficient information about the banking service described.

Section 1026.43 Minimum Standards for Transactions Secured by a Dwelling

43(e) Qualified Mortgages

43(e)(4) Qualified Mortgage Defined—Special Rules

The 2013 ATR Final Rule generally requires creditors to make a reasonable, good faith determination of a consumer's ability to repay any consumer credit transaction secured by a dwelling (excluding an open-end credit plan, timeshare plan, reverse mortgage, or temporary loan) and establishes certain protections from liability under this requirement for "qualified mortgages." These provisions, in § 1026.43(c), (e)(2), (e)(4), (e)(5), (e)(6) [47] and (f), implement the requirements of TILA section 129C(a)(1) and the qualified mortgage provisions of TILA section 129C(b).

To determine the qualified mortgage status of a loan, creditors must analyze whether the loan meets one of the definitions of "qualified mortgage" in § 1026.43(e)(2), (e)(4), (e)(5), (e)(6) or (f). Section 1026.43(e)(4) provides a definition of qualified mortgage for loans that (1) meet the prohibitions on certain risky loan features (*e.g.,* negative amortization and interest only features); (2) do not exceed certain limitations on points and fees under § 1026.43(e)(2); and (3) either are eligible for purchase or guarantee by one of the GSEs, while under the conservatorship of the Federal Housing Finance Agency, or are eligible to be insured or guaranteed by HUD under the National Housing Act (12 U.S.C. 1707 *et seq.*), the VA, the USDA, or RHS.[48] HUD, VA, USDA, and RHS have authority under the Dodd-Frank Act to define qualified mortgage standards for the types of loans they insure, guarantee, or administer. *See* TILA section 129C(b)(3)(B)(ii). Coverage under § 1026.43(e)(4) for such loans will sunset once each agency promulgates its own qualified mortgage standards and such rules take effect. Coverage of GSE-eligible loans will sunset when conservatorship ends.

Even if the Federal agencies do not issue additional rules or conservatorship does not end, the temporary qualified mortgage definition in § 1026.43(e)(4) will expire seven years after the effective date of the rule.[49] Covered transactions that satisfy the requirements of § 1026.43(e)(4) that are consummated before the sunset of § 1026.43(e)(4) will retain their qualified mortgage status after the temporary definition expires. However, a loan consummated after the sunset of § 1026.43(e)(4) may be a qualified mortgage only if it satisfies the requirements of another qualified mortgage provision in effect at that time.

Eligibility Under GSE/Agency Guides and Automated Underwriting Systems

The Proposal

As adopted by the 2013 ATR Final Rule, comment 43(e)(4)–4 clarifies that, to satisfy § 1026.43(e)(4)(ii), a loan need not be actually purchased or guaranteed by a GSE or insured or guaranteed by HUD, VA, USDA, or RHS. Rather, § 1026.43(e)(4)(ii) requires only that the loan be eligible for such purchase, guarantee, or insurance. For example, the comment provides that, for purposes of § 1026.43(e)(4), a creditor is not required to sell a loan to a GSE for that loan to be a qualified mortgage. Rather, the loan must be eligible for purchase or guarantee by a GSE. The Commentary clarifies that, with respect to GSEs, to determine eligibility, a creditor may rely on an underwriting recommendation provided by one of the GSEs' automated underwriting systems (AUSs) or their written guides. Accordingly, with regard to the GSEs, the comment states that a covered transaction is eligible for purchase or guarantee by Fannie Mae or Freddie Mac (and therefore a qualified mortgage under § 1026.43(e)(4)) if: (i) the loan conforms to the standards set forth in the Fannie Mae Single-Family Selling Guide or the Freddie Mac Single-Family Seller/Servicer Guide; or (ii) the loan receives an "Approve/Eligible" recommendation from Desktop Underwriter (DU); or an "Accept and Eligible to Purchase" recommendation from Loan Prospector (LP).

The Bureau proposed to revise comment 43(e)(4)–4 in a number of ways. First, the proposal would have clarified that a creditor is not required to comply with all GSE or agency requirements to show qualified mortgage status. Specifically, the proposed revision made clear that the creditor need not comply with certain requirements that are wholly unrelated to a consumer's ability to repay, including activities related to selling, securitizing, or delivering consummated loans and any requirement the creditor is required to perform after the consummated loan is sold, guaranteed, or endorsed for insurance (in the case of agency loans) such as document custody, quality control, and servicing. These requirements are spelled out in the most depth in the GSE and agency written guides, but may also be referenced in automated underwriting system conditions and in written agreements with individual creditors, as discussed further below.

The Bureau believed that the proposed comment would clarify the intended scope of the temporary category of qualified mortgage created in § 1026.43(e)(4) and facilitate compliance with the provisions of Regulation Z adopted in the 2013 ATR Final Rule. As explained in the preamble to the final rule, the Bureau established § 1026.43(e)(4) as a temporary transition measure designed to ensure access to responsible, affordable credit for consumers with debt-to-income ratios that exceed the 43 percent threshold that the Bureau adopted as a bright-line standard in the permanent general definition of qualified mortgage under § 1026.43(e)(2) while creditors adapted to the new ATR rules and other changes in economic and regulatory conditions. The Bureau believed that using widely recognized underwriting standards of Federal agencies and entities under Federal conservatorship to define qualified mortgages during this interim period would both facilitate compliance and ensure responsible lending practices. The temporary provision therefore bases qualified mortgage status on *eligibility* for purchase, insurance, or guarantee, which requires use of the federally related underwriting standards, but does not require actual sale, guarantee, or insurance endorsement. Furthermore, the temporary provision requires that a qualified mortgage must be eligible at consummation.

However, the Bureau recognized in the proposed rule that the GSEs and agencies impose a wide variety of requirements relating not only to underwriting of potentially eligible loans, but also to the mechanics of sale, guarantee, or insurance and post-consummation activities. Because

[47] The May 2013 ATR Final Rule amended the 2013 ATR Final Rule in part by adding two new types of qualified mortgages, at § 1026.43(e)(5) and (6). See 78 FR 35430 (June 12, 2013).

[48] Eligibility standards for the GSEs and Federal agencies are available at: Fannie Mae, *Single Family Selling Guide, https://www.fanniemae.com/content/guide/sel111312.pdf;* Freddie Mac, *Single-Family Seller/Servicer Guide, http://www.freddiemac.com/sell/guide/;* HUD Handbook 4155.1, *http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4155.1/41551HSGH.pdf;* Lenders Handbook—VA Pamphlet 26–7, *Web Automated Reference Material System (WARMS), http://www.benefits.va.gov/warms/pam26_7.asp; Underwriting Guidelines: USDA Rural Development Guaranteed Rural Housing Loan Program, http://www.rurdev.usda.gov/SupportDocuments/CA-SFH-GRHUnderwritingGuide.pdf.*

[49] The rule's effective date is January 10, 2014, thus the § 1026.43(e)(4) qualified mortgage definition expires at the latest after January 10, 2021.

underwriting is a complex process that involves assessment of the consumer's ability to repay the loan as well as other credit risk factors, the Bureau believed that it was appropriate to base qualified mortgage status under § 1026.43(e)(4) on the GSEs' and agencies' general standards concerning borrower, product, and mortgage eligibility and underwriting. While some of these underwriting requirements may be more closely or directly related to assessing a consumer's ability to repay than others, the Bureau believed that attempting to disaggregate them would be an extraordinarily complex task that would defeat the purposes of the temporary definition in adopting widely recognized standards to facilitate compliance and access to responsible credit. Where groups of requirements are wholly unrelated to underwriting (*i.e.,* wholly unrelated to assessing ability to repay and other risk-related factors), however, the Bureau believed that it was appropriate to specify that such requirements do not affect qualified mortgage status.

The Bureau believed that the items described in the comment would meet this test and provide greater clarity to the temporary definition of qualified mortgage. Because TILA requires assessment of a consumer's ability to repay a loan as of the time of consummation, the Bureau believed that GSE and agency requirements relating to post-consummation activity should not be relevant to qualified mortgage status. And because the temporary definition does not require actual purchase, guarantee, or insurance, the Bureau believed that it would not be appropriate to base qualified mortgage status on elements of the guides relating to the mechanics of actual delivery, purchase, guarantee, and endorsement. The Bureau recognized that most requirements wholly unrelated to underwriting involve post-consummation activity; however, pre-consummation GSE and agency requirements could also be wholly unrelated to underwriting. For example, the status of a creditor's approval or eligibility to do business with a GSE is not relevant for ascertaining qualified mortgage status using an AUS. The Bureau invited comment on this proposed clarification generally and on whether other GSE or agency requirements should be excluded.

Comments

Only one consumer group commented on the Bureau's inclusion of guidance stating that issues wholly unrelated to ability to repay would not affect a loan's QM status. This consumer group is also a nonprofit lender. Its comment suggested that the Bureau should state clearly those issues that are ''related'' to ability to repay, such as income or obligations that materially impact ability to repay, and violations of specific QM product restrictions, and rule out such things as credit score and appraisal requirements. This commenter also stated that failure to make this guidance clearer could reduce credit availability.

Industry commenters overwhelmingly supported the interpretation that issues wholly unrelated to ability to repay should not be considered in assessing the QM status of a loan under § 1026.43(e)(4). Most, however, also suggested that the guidance on what would be considered wholly unrelated to ability to repay should be clarified and the excluded items or categories expanded. Commenters agreed that failure to comply with post-consummation requirements should be excluded. As did the consumer group in the comment referenced above, some industry commenters requested that the Bureau make clear that items deemed related to ability to repay be limited to narrow issues of a borrower's ability to make the loan's payments, and that other risk-related factors be excluded. Specifically, commenters asked that factors related to willingness to repay (as opposed to ability to repay) and issues involving the attributes or defects of the collateral be excluded. Some commenters raised the issue of excluding jumbo loans.[50] Two commenters requested that a time limit be imposed so that repurchase or indemnification claims on seasoned loans would be disregarded. One commenter stated that income determinations are variable and subjective, so errors made in good faith should not invalidate QM status. Another commenter asked for guidance on some of the issues above, rather than specifically requesting exclusion.

In addition, commenters generally suggested that various other topics should be specifically listed as wholly unrelated to ability to repay, including: (1) Failure to comply with laws and regulations, including consumer protection laws and regulations; (2) purchase of a state-issued title guarantee for loans held in portfolio; (3) delayed note certification; (4) Ginnie Mae modification; (5) early buy-out programs; (6) non-material technical defects triggering repurchase or indemnification; and (7) ''additional repurchase requirements.''

The two GSEs both commented on the proposed rule, and both discussed the ''wholly unrelated to ability to repay'' guidance. One specifically stated support for the guidance, and both urged the Bureau to state that collateral-related issues were wholly unrelated to ability to repay.

Final Rule

The Bureau adopts the guidance on issues of what is wholly unrelated to ability to repay substantially as proposed, but has adopted the standard in the regulatory text to harmonize the eligibility requirements that must be met for the temporary qualified mortgage definition under the rule with those permitted under the Commentary. In addition, comment 43(e)(4)–4 has been revised to state that matters wholly unrelated to ability to repay are those matters that are wholly unrelated to credit risk or the underwriting of the loan, and to provide more detailed guidance on applying the standard.

As stated in the proposed rule, underwriting is a complex process that involves assessment of the consumer's ability to repay the loan as well as a variety of other credit risk factors. The Bureau made a deliberate decision in the 2013 ATR Final Rule to base qualified mortgage status under § 1026.43(e)(4) on the GSEs' and agencies' general underwriting and credit risk analysis standards. While some of these factors may be more closely and directly focused on consumers' ability to repay than others, the Bureau continues to believe that attempting to disaggregate GSE and agency underwriting requirements based on degree of relationship to ability to repay would be an extraordinarily complex task that would defeat the purposes of the temporary definition in adopting widely recognized standards to facilitate compliance and access to responsible credit. Indeed, the statute itself requires consideration of a borrower's credit history, which could relate to willingness as well as ability to repay. Exclusion of requirements regarding collateral and other risk-related factors

[50] Although one commenter asked that jumbo size, which renders a loan too large to be eligible for GSE purchase or guarantee, be deemed wholly unrelated to ability to repay, another commenter merely asked for guidance on whether or not jumbos would be excluded. The Bureau stated in the January 2013 final rule that the temporary qualified mortgage definition does not include ''jumbo'' loans in 1026.43(e)(4), given, in part, that the Bureau views the jumbo market as already robust and stable. Excluding jumbo loan size eligibility conditions for GSEs would effectively reverse the Bureau's conclusion on this matter. The Bureau continues to believe that the jumbo loan market does not need the benefit of temporary qualified mortgage definition and notes that jumbo loans can be qualified mortgages to the extent that they meet the other qualified mortgage definitions.

would require line-drawing exercises that could potentially interfere with the regulatory purpose. Moreover, allowing disaggregation would not be consistent with the use of AUS determinations to demonstrate compliance, as they involve interdependent risk factors and do not focus solely on a borrower's capacity to make payments.

The Bureau has revised the final comment to add an express general statement that matters wholly unrelated to ability to repay are those matters wholly unrelated to credit risk or the underwriting of the loan. The Bureau believes that this language, in conjunction with the reference to specific sets of requirements that are wholly unrelated to assessing ability to repay at the time of consummation (such as those related to selling, securitizing, or delivering consummated loans), provides useful guidance to stakeholders.

As stated in the proposed rule, and consistent with the final rule, QM status depends on eligibility for sale, insurance, or guarantee at consummation, not on an actual executed sale, insuring, or guarantee of the individual loan. Accordingly, the Bureau considers events occurring after consummation and GSE and agency requirements concerning execution of an actual sale, insuring, or guarantee of the loan to be wholly unrelated to ability to repay.[51] In addition, the Bureau believes that in regard to very limited matters, such as the status of a creditor's approval or eligibility to do business with a GSE, additional pre-consummation occurrences may also be wholly unrelated to ability to repay. Accordingly, the Bureau has revised the language in the final comment to identify specifically that these sets of requirements are considered wholly unrelated to ability to repay for purposes of the rule.

Although the Bureau has reviewed many of the requests for determinations as to particular requirements in the comments received, the Bureau notes that with respect to certain of these inquiries, there was not sufficient detail or background information to discern the precise nature of the request or question. For instance, commenters' bare suggestion that ''additional purchase requirements'' be deemed wholly unrelated to ability to repay was simply too vague to analyze, and would require further specification in order to apply the standard.

[51] Because the determination is based on the situation at consummation, the later repayment history or ''seasoning'' of the loan would not be an appropriate metric for this standard.

Use of Automated Underwriting Systems

The Proposal

The Bureau also proposed to revise comment 43(e)(4)–4 to clarify eligibility as determined by an automated underwriting system of a GSE or one of the agencies. As explained in comment 43(e)(4)–4 as adopted in the 2013 ATR Final Rule, the AUSs and the written guides of the GSEs as well as the agencies can be used for eligibility purposes under § 1026.43(e)(4). The proposed revision of the comment explained that to rely upon an AUS recommendation to demonstrate qualified mortgage status a creditor must have (1) accurately inputted the loan information into the automated system, and (2) satisfied any accompanying requirements or conditions to the AUS approval that would otherwise invalidate the recommendation, unless, as discussed above, the conditions are wholly unrelated to the consumer's ability to repay. The comment as adopted in the 2013 ATR Final Rule assumed that any recommendation used for compliance would be valid, and these clarifications merely listed two criteria that should be monitored to ensure that validity. In particular, because the AUSs generate a list of conditions that must be met in support of the approval designation, the Bureau believed that those conditions must be satisfied to show eligibility for purchase, guarantee, or insurance. The Bureau sought comment on these revisions as well and also proposed technical edits to comment 43(e)(4)–4 for clarity and accuracy.

Comments

The consumer and community group commenters did not discuss the guidance in comment 43(e)(4)–4 requiring that an AUS determination be based on accurate inputs, and that the creditor comply with any requirements and conditions specified by the AUS. About half of the industry commenters that specifically discussed this guidance supported its inclusion. Industry commenters asked that the Bureau make clear that QM status will not be invalidated by minor inaccuracies and by inaccuracies that would not change the outcome of the AUS determination. One commenter stated that it will not be possible to determine whether or not a loan would have been approved with accurate inputs.

Final Rule

The Bureau adopts the comment as proposed, with minor edits for clarity. As stated in the regulation, a loan is a QM if it is eligible for purchase, insurance or guarantee by a GSE or agency other than with regard to issues wholly unrelated to ability to repay, and meets the other relevant requirements. For this reason, minor inaccuracies in input data that do not affect eligibility will not affect QM status. The Bureau believes the convenience and ease of compliance made possible by this provision are more important than avoiding those few situations in which it is difficult to determine which inaccuracies will affect the AUS outcome.

Although the reference to issues wholly unrelated to ability to repay in the main paragraph of the proposed comment applied to the requirements and conditions accompanying an AUS determination, and unquestionably do now that the standard is in the regulatory language, the Bureau believes that repeating such language in paragraph ii will enhance the clarity of the comment, and is doing so.

Effect of Written Contract Variances

The Proposal

The Bureau also proposed to revise comment 43(e)(4)–4 in a third way to clarify further that a loan meeting eligibility requirements provided in a written agreement between the creditor and a GSE or agency that permits variation from the standards of the written guides and/or AUSs in effect at the time of consummation is also eligible for purchase or guarantee by the GSEs or insurance or guarantee by the agencies for the purposes of § 1026.43(e)(4). Thus, such loans would be qualified mortgages. The Bureau recognized that these agreements between creditors and the GSEs or agencies effectively constitute modification of, or substitutes for, the general manuals or AUSs with regard to these creditors. In many cases, the agreements allow the creditors to use other automated underwriting systems rather than the GSE or agency systems, subject to certain conditions or limitations on which loans the GSE or agency will accept as eligible for purchase, guarantee, or insurance. The Bureau believed that it was therefore appropriate for the purposes of § 1026.43(e)(4) to consider the agreements to be equivalent to the standard written guides for purposes of the specific creditor to which the agreement applies. Many of these agreements are necessary to accommodate local and regional market variations and other considerations that do not substantially relate to ATR-related underwriting criteria and therefore are generally consistent with the consumer protection and other purposes of the rule. However, the Bureau did not believe that it would be appropriate to allow one creditor to rely on the terms specified in another creditor's written agreement with a GSE or agency to establish qualified mortgage status, as the written agreements are individually negotiated and monitored. The Bureau sought comment on this proposed clarification generally and on whether other variations on standard guides and eligibility criteria should be considered.

Comments

Two consumer and community group commenters discussed the use of variances with § 1026.43(e)(4). One comment, from a group of organizations, stated that allowing use of variances was a mistake because the agreements are private and this would make them very difficult for consumers to enforce when they are violated. This comment also suggested that if the variance provision is adopted the Bureau should make clear that a borrower would have access to such variance agreements by sending a qualified written request under RESPA. The other consumer group commenter, which operates a nonprofit lender, supported the use of variances as provided in the comment.

Industry commenters were very supportive of allowing the use of variances. However, one association representing credit unions opposed allowing the use of variances, stating that it would disadvantage smaller market participants. A real estate association commented that variances should be allowed but should be required to be made public so that any creditor could request use of their terms. Other industry commenters requested that the Bureau make clear that later assignees could rely on the QM status of loans originated pursuant to a variance. Another commenter asked that the Bureau specify that, in order to be relied on, a variance must be in effect at the time of consummation of the loan.

Several industry commenters pointed out that these variances are often used with correspondent lenders, and the creditor who has negotiated the variance agreement acts as an aggregator or sponsor, pooling loans originated by others. They stated that the comment as proposed would present a problem because it states that the variance can only be used by a creditor who is a party to the agreement with the GSE. They further stated that this problem could interfere with the origination of a large number of loans that meet the GSEs' standards, and argued that correspondent lenders should be allowed to rely on the variances of their sponsors or aggregators. One large bank, however, opposed the idea of allowing one creditor to rely on another's variance, stating that this might allow loans to become QMs after consummation.

One of the GSEs provided comment on the variance provision, strongly supporting it, and pointing out in addition that both GSEs sometimes grant individual loan waivers of their standards. The GSE stated that these waivers do not proceed from an increase in its appetite for risk, and are only granted ''on an exceptional basis,'' and that they should be treated the same as the negotiated variances. One industry association also asked that such individual waivers be treated this way.

Final Rule

The language regarding variances is adopted substantially as proposed, with two important changes. The Bureau agrees that disallowing correspondent use of variances would interfere unduly with the market, and is adding language to clarify use in such circumstances without allowing wholly unrelated entities to rely on some other creditor's agreement. Also, the Bureau believes that individual waivers granted by the GSEs should benefit from the same treatment as creditor-specific variances negotiated with the GSEs.

As with all the QM provisions, the status of a loan is determined at the time of consummation. The variance applied to a transaction must be in effect at the time a loan is consummated, and the loan must meet all relevant requirements at that time. For this reason, a loan cannot be retroactively made into a QM by a creditor or assignee. In addition, because the status is determined at consummation, later assignees can rely on that status if it is valid. Allowing correspondents to rely on the variances of their sponsors or aggregators in effect at the time of consummation will not change this situation, and it will help to alleviate concerns that only larger market participants may take advantage of negotiated variances. The language of comment 43(e)(4)–4 has been crafted to ensure that the correspondent is involved in a direct relationship with the variance holder and originating the QM pursuant to that relationship.

In addition, the Bureau does not believe that allowing use of variances will disadvantage smaller market participants, since it is intended only to maintain the current market situation. Although variances are private agreements, with the potential for attendant disadvantages described by commenters above such as difficulty of enforcement, the Bureau does not believe it is appropriate to regulate transparency for these agreements through this narrowly focused amendatory rulemaking, without further review. As always, the Bureau will monitor the effects of its rules on the marketplace going forward.

The Bureau has decided to allow loans benefitting from individual waivers granted by the GSEs to be treated the same as loans originated following negotiated variances. The Bureau has no reason to believe that these loans present undue risk to consumers, and notes that the GSEs are under government conservatorship.

The provision regarding variances is adopted as proposed, with the two changes discussed above.

Repurchase and Indemnification Demands

The Proposal

The Bureau also proposed new comment 43(e)(4)–5 to provide additional clarification on how repurchase and indemnification demands by the GSEs and agencies may affect the qualified mortgage status of a loan. The proposed comment did not amend the meaning of the current rule but clarified how a determination of the qualified mortgage status of a loan should be understood in relation to claims that the loan was not eligible for purchase, insurance, or guarantee and therefore not a qualified mortgage. In making the proposal, the Bureau understood that facts upon which eligibility status was determined at or before consummation could later be found to be incorrect. Often, a repurchase or indemnification demand by a GSE or an agency involves such issues. However, the mere occurrence of a GSE or agency demand that a creditor repurchase a loan or indemnify the agency for an insurance claim does not necessarily mean that the loan is not a qualified mortgage.

Proposed comment 43(e)(4)–5 would have provided that a repurchase or indemnification demand by the GSEs, HUD, VA, USDA, or RHS is not dispositive in ascertaining qualified mortgage status. Much as qualified mortgage status under the general definition in § 1026.43(e)(2) may typically turn on whether the consumer's debt-to-income ratio at the time of consummation was equal to or less than 43 percent, qualified mortgage status under § 1026.43(e)(4) may typically turn on whether the loan was eligible for purchase, guarantee, or insurance at the time of consummation. Thus, for example, a demand for repurchase or indemnification based on post-consummation GSE or agency requirements would therefore not be relevant to qualified mortgage status. As indicated above, such factors meet the wholly unrelated to ability to repay standard that the Bureau is finalizing in § 1026.43(e)(4). Only reasons for a repurchase or indemnification demand that specifically apply to the qualified mortgage status of the loan under § 1026.43(e)(4) would be relevant, as discussed above in connection with comment 43(e)(4)–4. Moreover, the mere fact that a demand has been made, or even resolved, between a creditor and GSE or agency is not dispositive with regard to eligibility for purposes of § 1026.43(e)(4), as those parties are involved in an ongoing business relationship rather than an adjudicatory process. However, evidence of whether a particular loan satisfied the § 1026.43(e)(4) eligibility criteria at consummation may be brought to light in the course of dealings over a particular demand, depending on the facts and circumstances. Such evidence—like any evidence discovered after consummation that relates to the facts as of the time of consummation—may be relevant in assessing whether a particular loan is a qualified mortgage.

To clarify this point further, proposed comment 43(e)(4)–5 included two examples of relevant evidence discovered after consummation. In the first example, one would assume that a loan's eligibility for purchase was based in part on the consumer's employment income of $50,000 per year. The creditor uses the income figure in obtaining an approve/eligible recommendation from DU. A quality control review, however, later determines that the documentation provided and verified by the creditor to comply with Fannie Mae requirements did not support the reported income of $50,000 per year. As a result, Fannie Mae demands that the creditor repurchase the loan. Assume that the quality control review is accurate, and that DU would not have issued an approve/eligible recommendation if it had been provided the accurate income figure. The Bureau believed that, given the facts and circumstances of this example, the DU determination at the time of consummation was invalid because it was based on inaccurate information provided by the creditor; therefore, the loan was never a qualified mortgage.

For the second example, one would assume that a creditor delivered a loan, which the creditor determined was a qualified mortgage at the time of consummation, to Fannie Mae for inclusion in a particular To-Be-Announced Mortgage Backed Security (MBS) pool of loans. The data submitted by the creditor at the time of loan delivery indicated that the various loan terms met the product type, weighted-average coupon, weighted-average maturity, and other MBS pooling criteria, and MBS issuance disclosures to investors reflected this loan data. However, after delivery and MBS issuance, a quality control review determines that the loan violates the pooling criteria. The loan still meets eligibility requirements for other Fannie Mae products and loan terms. Fannie Mae, however, requires the creditor to repurchase the loan due to the violation of MBS pooling requirements. Assume that the quality control review determination is accurate. The reason the creditor repurchases this loan would not be relevant to the loan's qualified mortgage status. The loan still meets other Fannie Mae eligibility requirements and therefore remains a qualified mortgage based on these facts and circumstances.

The Bureau invited comment on proposed comment 43(e)(4)–5 in general. The Bureau also solicited comment on whether additional examples or other particular situations should be provided or whether alternatives for eligibility other than relationship to ability-to-repay standards should be adopted that would determine the qualified mortgage status of a loan.

Comments

One consumer group and nonprofit lender commented on the explanation of how repurchase and indemnification demands should be understood in relation to QM status, stating support for the Bureau's rule but requesting more fully developed guidance on the issue.

Industry commenters overwhelmingly supported the addition of comment 43(e)(4)–5, but also had various suggestions for changes. One industry commenter, along with one of the GSEs, stated that the first example given, in which an accurate determination that the creditor-reported income did not support QM status meant that QM status was invalid, appeared to suggest that the repurchase demand was indeed dispositive. A trade association asked that the Bureau not include as ''loans for which repurchase or indemnification demand has been made'' those loans that are not eventually repurchased or indemnified.

Both GSEs commented on this guidance, and both supported the addition of comment 43(e)(4)–5. One GSE also suggested that the Bureau should delete the examples given because they would cause confusion. One also requested that the Bureau make clear that even if QM status under § 1026.43(e)(4) is invalidated, the loan may still have qualified for QM status under another provision.

Final Rule

Comment 43(e)(4)–5 is adopted as proposed, with two small edits to make clear that only QM status under § 1026.43(e)(4) is being discussed in the examples and that in the second example the critical fact is that the loan still meets Fannie Mae's eligibility requirements.

Regarding the first example in the comment, it is not the repurchase demand nor the quality control review that is dispositive as to QM status, but the fact that the finding that the income figure is unsupported by the documentation is stated to be ''accurate.'' The example is a hypothetical, and assuming the accuracy of an issue that would normally have to be established through an investigation of the facts and circumstances of the transaction allows for better explanation of how the rule works. As for the issue of what should be considered a repurchase or indemnification demand, the question is irrelevant to QM status. Repurchase or indemnification demands are potentially relevant to QM status only because they may indicate or lead to evidence that a loan did not qualify as a QM at the time of consummation. In addition, the Bureau believes that the examples will increase clarity for stakeholders, and not cause confusion. Accordingly, the Bureau considers the two examples presented as providing clear and appropriate guidance on the issue, with the edits mentioned above.

Appendix Q to Part 1026—Standards for Determining Monthly Debt and Income

Overview

Under the general definition for qualified mortgages in § 1026.43(e)(2), a creditor must satisfy the statutory criteria restricting certain product features and points and fees on the loan, consider and verify certain underwriting requirements that are part of the general ability-to-repay standard, and confirm that the consumer has a total (or ''back-end'') debt-to-income ratio (DTI) that is less than or equal to 43 percent. To determine whether the consumer meets the specific DTI requirement, the creditor must calculate the consumer's monthly DTI in accordance with appendix Q. The Bureau adopted the 43 percent DTI requirement and other modifications to the statutory criteria pursuant to its authorities under TILA section 129C and 105(a).[52]

Appendix Q, as adopted, contains detailed requirements for determining ''debt'' and ''income'' for the purposes of the DTI calculation based on the definitions of those terms set forth in HUD Handbook 4155.1, *Mortgage Credit Analysis for Mortgage Insurance on One-to-Four-Unit Mortgage Loans.* The standards in the Handbook are used by creditors originating residential mortgages insured by the Federal Housing Administration (FHA) to determine and verify a consumer's total monthly debt and monthly income. For the purposes of appendix Q, the Bureau largely codified the Handbook, but modified various portions of it to remove standards and references unique to the FHA underwriting process.

In adopting appendix Q in the 2013 ATR Final Rule, the Bureau believed that using, to the extent possible, existing HUD/FHA underwriting guidelines as the foundation for determining ''debt'' and ''income'' for DTI purposes would provide creditors with well-established standards for determining whether a loan is a qualified mortgage under § 1026.43(e)(2).

Following publication of the 2013 ATR Final Rule, the Bureau received a number of inquiries from industry stakeholders regarding provisions codified in the appendix that they believed had been intended to function as flexible standards used by the FHA for insurance underwriting purposes, rather than codified as bright-line requirements for determining debt and income. Concerns were raised that these provisions may be properly suited for the purposes of a holistic and qualitative underwriting analysis but are not well-suited to function as regulatory requirements that are not subject to discretionary variance or waiver on an individual basis. Stakeholders also expressed concern that many of these provisions provided little clarity or guidance for creditors for compliance purposes. Similarly, stakeholders expressed concerns that the broad nature of these provisions could undermine the presumption of compliance available to creditors who make qualified mortgages and expose them to significant litigation risk.

In response to these concerns, the Bureau included certain proposed revisions to appendix Q in its proposed rule to facilitate compliance when determining DTI and to further the purposes of the ATR Final Rule. The Bureau agreed that certain provisions of appendix Q as adopted were not properly suited to function as regulations. The Bureau intended appendix Q to serve as a reliable mechanism for creditors to evaluate income and debts for the purpose of determining DTI and not as a general and flexible underwriting policy for assessing risk (as it is used by FHA in the context of insurance). The Bureau also recognized that it would not have the same level of discretion regarding the application of appendix Q.[53]

The Bureau therefore proposed revisions to appendix Q on: (1) Stability of income, and the creditor requirement to evaluate the probability of the consumer's continued employment; (2) with regard to salary, wage, and other forms of consumer income, the creditor requirement to determine whether the consumer's income level can reasonably be expected to continue; (3) creditor analysis of consumer overtime and bonus income; (4) creditor analysis of consumer Social Security income; (5) requirements related to the analysis of self-employed consumer income; (6) requirements related to non-employment related consumer income, including creditor analysis of consumer trust income; and (7) creditor analysis of rental income.

The Bureau also proposed other revisions to clarify the application of appendix Q, as well as general technical and wording changes throughout appendix Q for consistency and clarification, including technical changes to conform to the specific purpose that appendix Q serves in the 2013 ATR Final Rule, as opposed to the function that the HUD Handbook serves for FHA underwriting.

Overview of Comments on Bureau's Appendix Q Proposals

Commenters, including both industry and consumer commenters, generally supported the Bureau's proposed changes to appendix Q. A bank for example stated that it appreciated the Bureau's efforts to establish clear and reliable standards within appendix Q, and that it generally believed the proposed amendments would allow creditors to underwrite loans with improved confidence that appendix Q standards have been met. A bank trade association stated that it appreciated the Bureau's efforts to clarify the ability-to-repay regulations and stated that it believed the Bureau's proposals would go a long way in improving the final rules. A state credit union association stated that it strongly supported the Bureau's proposed changes to appendix Q as certain provisions adopted in appendix Q are not suitable to function as regulations. A consumer organization stated its support for the Bureau's clarifications of appendix Q but also suggested the need for further clarifications. Most commenters suggested additional clarifications to appendix Q, some specific to the Bureau's proposals, and some beyond the Bureau's specific proposals—including general revisions.

Response to General Comments on Appendix Q

The Bureau appreciates the comments received on its appendix Q proposals. The Bureau believes that the proposals as adopted in this final rule will further the purpose and intent of appendix Q by establishing clearer requirements for assessing the debt and income of consumers, while at the same time facilitating creditor compliance and access to credit for consumers. The comments received generally support the Bureau's view.

I. CONSUMER ELIGIBILITY

A. Section I.A. Stability of Income

The Proposal

The Bureau proposed revising the criteria in appendix Q for determining whether a consumer's income is ''stable'' for the purposes of DTI.

Appendix Q as adopted required in section I.A.3.a that creditors evaluate the ''probability of continued employment'' by analyzing, among other things, (1) the consumer's past employment record; (2) the consumer's qualification for the position; (3) the consumer's previous training and education; and (4) the employer's confirmation of continued employment. Stakeholders had raised concerns that, beyond analysis of a consumer's past employment record and current employment status, each of these requirements was incompatible with appendix Q's purpose of providing clear rules for determining debt and income, and was likely to result in compliance difficulty and significant exposure to litigation risk for creditors attempting to avoid such risk by originating qualified mortgages and thereby taking advantage of the presumption of compliance. Stakeholders, for example, indicated

[52] The Bureau notes that the specific 43 percent debt-to-income requirement applies only to qualified mortgages under § 1026.43(e)(2). The specific DTI requirement does not apply to loans that meet the qualified mortgage definitions in § 1026.43(e)(4), (5), (6), or (f), or that are not qualified mortgages and instead comply with the general ability-to-repay standard.

[53] 78 FR 25648.

that many employers were likely to be unwilling for various reasons (including but not limited to economic uncertainty) to confirm that a consumer's employment will continue into the future, and similarly creditors may be unqualified to evaluate a consumer's education, training, and job qualifications.

In response to these concerns, the Bureau proposed to amend appendix Q in section I.A.3.a to eliminate the requirements that creditors determine the ''probability of continued employment'' by considering a consumer's ''qualifications for the position'' and ''previous training and education.'' The Bureau proposed instead to amend the section to require creditors to examine a consumer's past and current employment. The Bureau also proposed to remove the requirement that creditors obtain the ''employer's confirmation of continued employment'' and instead require only that the creditor examine the ''employer's confirmation of current, ongoing employment status.'' The Bureau believed that requirements for a creditor to evaluate a consumer's training, education, and qualifications for his or her position are not well-suited to function as regulations designed to enable creditors to determine debts and income and in turn calculate DTI, and may increase exposure to litigation risk. Specifically, the Bureau indicated that it was not entirely clear what creditors would need to do in order to comply with these requirements, or how those determinations would affect a consumer's income for the purpose of calculating DTI.

The Bureau also stated its belief that requiring creditors to obtain an employer's confirmation of the consumer's continued employment would not function properly as a regulatory requirement because employers likely would be unwilling to provide any confirmation of employment continuing beyond current, ongoing employment. The Bureau pointed out that without the benefit of waiver or variance, such a requirement could serve to disqualify any such consumer's employment income from being included in the DTI calculation—which would frustrate access to credit.

The Bureau stated further that a confirmation of current, ongoing employment status is adequate to verify employment for purposes of determining income. To that end, the Bureau also proposed for clarification purposes a proposed note to section I.A.3 that states creditors may assume that employment is ongoing if a consumer's employer verifies current employment and does not indicate that employment has been, or is set to be terminated. The proposed note made clear, however, that creditors should not rely upon a verification of current employment that includes an affirmative statement that the employment is likely to cease, such as a statement that indicates the employee has given (or been given) notice of employment suspension or termination.

Finally, the Bureau also proposed several other technical, non-substantive changes to section I.A for clarification purposes.

Comments

Commenters, primarily from industry, who submitted comments concerning the Bureau's proposed changes to section I.A.3 were generally supportive of those changes although some clarification or additional guidance was suggested by several.

Several bank trade associations and a bank, in expressing support for the changes, noted that: (1) While it is reasonable to require an examination of current employment, provisions which require a creditor to speculate or predict future employment are problematic; (2) creditors should not be asked to second guess employer hiring decisions or be expert in establishing qualifications for positions; (3) the eliminated criteria could have a negative impact on consumers with ''on the job'' education; and (4) employers will not discuss certainty of continued employment for fear that it could create a new employment contract for at-will employees. These commenters also suggested that the Bureau provide guidance that verbal confirmation would satisfy the requirement that the creditor examine the employer's confirmation of the consumer's ''current, ongoing employment status'' as provided in I.A.3.a as proposed by the Bureau.

A state banking association commenter, in expressing support for the Bureau's proposal to replace the section I.A.3.a requirement that the creditor obtain an employer's ''confirmation of continued employment'' for an applicant with a requirement to ''confirm current, ongoing employment,'' requested that the Bureau provide additional clarification for instances in which employment is inherently dependent on contingencies outside the employee's or employer's control—such as applicants whose salaries are funded through ongoing grants, agency funded positions at a nonprofit organization or federal work programs, or applicants who are political appointees. A national banking association commenter requested similar clarification noting that flexibility is required to ensure that all populations are adequately served.

One commenter, a manufactured housing lender, with regard to the Bureau's proposed note amending section I.A.3.a, stated that the Bureau should make clear that the creditor has no obligation to inquire—either in writing or verbally—as to the employee's job performance and/or whether any suspension or termination is imminent.

A credit union commenter that indicated that it serves the education community stated, in referring to the Bureau's proposed note amending I.A.3.a, that the employment of many of its members who are teachers, professors and other educators is established by year-to-year contracts that generally include a termination date. The commenter noted that these contracts are generally renewable and negotiated through the teacher's association or other union representation. The commenter stated that the Bureau's proposed note would likely preclude it from relying upon a copy of a member's contract as evidence of stability of income since if the contract included a termination date the commenter would be unable to assume that the member's employment is ''ongoing.'' The commenter suggested the proposed note be expanded to consider fields of employment that may be viewed as ''seasonal'' or industries where employment is established by contract, such as the education community, so that a creditor could also examine past and current employment as part of its analysis of the stability of income.

The manufactured housing lender commenter also suggested that if the Bureau adopted its proposal to amend section I.A.3.a to eliminate the obligation of creditors to predict a consumer's likelihood of continued employment, that it remove existing section I.A.3.b. Section I.A.3.b provides that ''creditors may favorably consider the stability of a consumer's income if he/she changes jobs frequently within the same line of work, but continues to advance in income or benefits. In this analysis, income stability takes precedence over job stability.'' The commenter stated that this section existed as a caveat to the obligation of creditors to predict a consumer's future employment or advancement, and with the elimination of that requirement it is no longer necessary.

Final Rule

The Bureau is adopting the revisions to section I.A.3 as proposed. The Bureau agrees with commenters that elimination of the requirements that the creditor: (1) examine the consumer's qualifications for the position, previous training and education; and (2) examine the employer's confirmation of the consumer's continued employment—will provide clearer and more appropriate standards for creditors under appendix Q, and facilitate compliance with the Bureau's ATR Final Rule.

With regard to the comment suggesting that the Bureau amend its proposed note in section I.A.3.a to expand it to consider industries where employment is established by contract, including the education community, the Bureau appreciates the comment and recognizes the special circumstances confronted by contract employees. The Bureau believes, however, that additional revisions to section I.A.3.a are not necessary given the existing provisions of appendix Q with regard to the treatment of seasonal employment and income. That language, at sections I.A.2.b and I.B.5, provides the means for creditor assessment of the employment and stability of income of contract employees for purposes of appendix Q.[54]

With regard to the comment requesting that the Bureau clarify that the creditor has no obligation to inquire about a consumer's job performance and/or whether any suspension or termination is imminent, the Bureau's revisions to I.A.3.a do not require creditors to affirmatively make such inquiries. That section, as revised, only provides that a creditor cannot rely on a verification of current employment if it includes an affirmative statement that employment is likely to cease.

Concerning the comment requesting that the Bureau provide guidance to explicitly allow verbal confirmation by employers of the consumer's current, ongoing employment status, the Bureau would like to review this request further to ensure that such guidance would be consistent with the purposes of appendix Q and the ATR Final Rule. Similarly, with regard to the comment requesting clarification that a creditor's obligation to only consider a consumer's past and current and ongoing (and not continual) employment as proposed by the Bureau includes employment in contingent situations outside of the employee's or employer's control, the Bureau plans to review this issue further to determine whether such clarification to the existing appendix Q requirements is necessary, and how any such clarification would be framed. As discussed above, the Bureau believes appendix Q provides creditors with the ability to assess the employment and stability of income of employees generally and contract employees in particular.

Finally, with regard to the comment recommending the deletion of section I.A.3.b as unnecessary with the adoption of the Bureau's proposed revisions to section I.A.3.a, the Bureau disagrees, as it believes that section I.A.3.b, as amended by the Bureau's proposed revisions, has continuing relevance in the determination of the stability of the consumer's income. As revised, section I.A.3.a requires an examination of the consumer's past employment record and a verification of current, ongoing employment status as a method of assessing stability of income. Section I.A.3.b provides creditors with an additional method of assessing stability of income, and of meeting the ability to repay and qualified mortgage requirements, in the situation where a consumer changes jobs frequently.

B. Section I.B. Salary, Wage and Other Forms of Income

Section I.B.1.a of appendix Q, the ''General Policy on Consumer Income Analysis,'' as adopted in the ATR Final Rule stated that creditors must analyze the income for each consumer who will be obligated for the mortgage debt to determine whether his/her income level can be reasonably expected to continue ''through at least the first three years of the mortgage loan.'' Sections I.B.2 and I.B.3 of appendix Q as adopted similarly required that creditors determine whether overtime and bonus income ''will likely continue'' and that they ''establish and document an earnings trend for overtime and bonus income.'' The Bureau received inquiries from industry stakeholders on these sections of Appendix Q similar to those received regarding section I.A.1, noting, among other things, (1) that these provisions codify general, forward-looking standards that are better suited for the purposes of a holistic and qualitative underwriting analysis (such as the FHA guidelines for determining insurance eligibility) and may not function properly as regulations; and (2) because the Bureau may not have the flexibility to waive or grant variances on an individual basis regarding the application of appendix Q, these provisions will undermine the purpose of appendix Q to serve as a reliable mechanism for evaluating income and debts for the purpose of determining the qualified mortgage status of a loan, and also increase the risk of litigation.

In response to these issues raised by stakeholders, the Bureau proposed several amendments to section I.B of appendix Q to explain and clarify the criteria for calculating a consumer's employment income and to determine whether a consumer's income is continuing for the purposes of the DTI calculation.

I.B.1. General Policy on Consumer Income Analysis

The Proposal

The Bureau proposed to amend section I.B.1.a to require creditors to evaluate only whether a consumer's income level would not be reasonably expected to continue based on the documentation provided, with no three-year requirement. In support of this proposal, the Bureau stated its belief that the intended purpose of appendix Q would not be served by requiring creditors to predict a consumer's employment status up to three years after application. The Bureau stated further that creditors should be required to analyze recent and current employment, along with any evidence in the applicant's documentation indicating whether employment is likely to continue. The Bureau therefore, proposed to add a note to section 1.B.1.a to make clear that creditors should not assume that a consumer's wage or salary income can be reasonably expected to continue if the verification of current employment includes an affirmative statement that the employment is likely to cease, such as a statement that indicates the employee has given (or been given) notice of employment suspension or termination. The Bureau stated however, that if the consumer's application and the employment confirmation indicate that the consumer is currently employed and provide no such indication that employment will cease, the Bureau believed, as reflected in the proposed note, that the creditor should be able to use that consumer's income without an obligation to predict whether or not that consumer will be employed on some future date.

Comments

Various industry participants commented on the Bureau's proposed amendments to section 1.B.1.a of appendix Q, and the elimination of the 3-year requirement. These commenters

[54] The Bureau notes that Section II.E.4, Projected Income for New Job, provides the means for creditor assessment of projected income where such income does not already satisfy the requirements of Section I.

suggested additional clarifications to this section.

A joint bank trade association and a bank recommended revising section 1.B.1.a to require each consumer to disclose to the lender whether the consumer has reason to believe that their income level will not continue through the first three years of the mortgage. These commenters noted that consumers are in the best position to know whether they expect to retire, take a leave of absence or otherwise not have their income continue for the first three years of the mortgage loan, and that lenders have no way to reliably determine this. They stated further that questioning consumers about retirement or time off to raise children raises potential fair lending issues. They also requested guidance on the treatment of statements from consumers such as, ''I might retire.''

Another bank trade association, in commenting on the Bureau's proposed elimination of the requirement to analyze whether the consumer's income level can reasonably be expected to continue through the first three years of the mortgage loan, requested clarification of how far into the future creditors must reasonably expect income to continue.

One bank commenter in stating its support for the Bureau's proposed changes in sections I.B.1, 2 and 3, stated that it agreed with the Bureau that creditors cannot be reasonably expected to evaluate and document whether a consumer's income level can be expected to continue for a three-year period.

Various other commenters suggested several other changes to section I.B. For example, similar to the joint bank trade association comment on I.B.1.a discussed above, several commenters raised possible fair lending issues with regard to the section I.B.1 notes, specifically, section i, which states that effective income for consumers planning to retire during the first three-year period must include documented retirement benefits, Social Security payments, and other payments expected to be received in retirement. One bank, for example, stated that while it supported the existing section i it recommended that, to mitigate potential fair lending risks based on age, the Bureau add a clarification that creditors should not ask consumers about future retirement plans, but should consider documented retirement benefits and payments if a consumer disclosed a plan to retire during the first three-year period. Another bank commenter similarly requested that the Bureau explicitly state, for fair lending reasons, that creditors are not expected to ask consumers if they plan to retire. This commenter also noted that it would be impracticable if not impossible to get documented benefits and payments if the consumer has yet to actually receive any retirement income and may not activate the source for up to a period of three years. The joint bank trade association commenter referred to above suggested adding language to section i of the notes indicating that effective income requirements for consumers planning to retire only applies to those who disclose such plans. A bank commenter, citing existing section ii of the notes, which prohibits creditors from asking consumers about possible future maternity leave, suggested, for fair lending reasons, that the Bureau add a clarification that creditors should not ask consumers about future medical leaves, and a joint bank trade association commenter suggested changing the term ''maternity'' leave to ''medical'' leave in section ii of the notes.

Final Rule

The Bureau is adopting the revisions to section I.B.1 as proposed. The Bureau continues to believe that the requirement in section I.B.1.a eliminated by the Bureau's proposal, *i.e.,* that the consumer's income must be analyzed to determine whether the consumer's income level can be reasonably expected to continue ''through the first three years of the mortgage loan,'' does not serve the intended purposes of appendix Q. Instead, as proposed, the Bureau revises section I.B.1.a to require only that the creditor determine whether a consumer's income level ''can be reasonably expected to continue.'' New section iii of the notes to section I.B.1, adopted by this final rule, provides that creditors can assume that the consumer's salary or wage income can be reasonably expected to continue if the consumer's employer verifies current employment and income and does not indicate that employment has been or is set to be terminated. That section states further, however, that this assumption cannot be made by the creditor if a verification of current employment includes an affirmative statement that the consumer's employment is likely to cease—such as a statement that the consumer has given or been given notice of employment suspension or termination. The Bureau believes that, as revised by this final rule, section I.B.1 effectively sets out the analysis required of the creditor for assessing the continuance of consumer salary and wage income, and is consistent with the purposes of appendix Q.

With regard to the commenter that requested clarification to appendix Q on how far into the future creditors must reasonably expect a consumer's income to continue, the Bureau believes that section I.B.1.a, as revised by the Bureau, effectively sets out the standard needed to be followed by creditors. As stated in new section iii of the notes, creditors can ''assume that salary or wage income . . . can be reasonably expected to continue if the consumer's employer verifies current employment and income and does not indicate that employment has been or is set to be terminated.'' That section, as revised by the Bureau, does not require creditors to make a determination that the consumer's income will continue through the first three years of the mortgage loan, or any other specified period.

The Bureau appreciates the recommendations from some commenters that section I.B.1 be amended to require consumers to disclose whether they have reason to believe their income level will not continue as the consumer is in the best position to know their future employment and income status. However, section I.B.1 already provides that creditors may assume that the consumer's salary or wage income can be reasonably expected to continue if the consumer's employer verifies current employment and income and does not indicate that employment has been, or is set to be terminated. Where no such appropriate verification is provided, the creditor must analyze the consumer's income and determine whether the consumer's income level can be reasonably expected to continue. In such cases, the Bureau believes that further analysis should be required of creditors, and that, as revised, section I.B provides creditors with an effective regulatory framework for carrying out that analysis.

With regard to the fair lending concerns raised by some commenters regarding questions presented to consumers relating to future retirement plans, the Bureau agrees that the final rule and appendix Q do not obligate creditors to ask consumers when they expect to retire. If, however, a consumer discloses a plan to retire during the first three-year period by making an affirmative statement of such plans, creditors should consider documented retirement benefits, Social Security payments, and other payments expected to be received in retirement. The Bureau similarly believes that the ATR Final Rule and appendix Q do not require creditors to ask whether a consumer may, in the future, take medical leave. The Bureau does not believe it is necessary, however, to amend appendix Q with specific statements in that regard. In all cases, the Bureau expects creditors to fully comply with all applicable fair lending laws.

I.B.2. Overtime and Bonus Income.

The Proposal

The Bureau also proposed changes to section 1.B.2 regarding overtime and bonus income.[55] Specifically, the Bureau proposed to eliminate the requirement in section I.B.2.a that creditors determine whether such income ''will continue.'' Instead, the proposal would have amended section I.B.2.a. to provide that creditors must focus on evaluating the consumer's documented overtime and bonus income history for the past two years and any submitted documentation indicating whether the income likely will cease. In proposing this change the Bureau stated that it recognized that overtime and bonus income may vary from year to year and generally may be less reliable than salary but noted that, in certain occupations, overtime and bonus income may be an integral and reliable component of the consumer's income. The Bureau stated further that while it believed that creditors must confirm that overtime and bonus income is not anomalous, the requirement to analyze the consumer's two-year overtime and bonus income history, and to verify that the submitted documentation does not indicate overtime or bonus income will cease, would adequately address this concern while satisfying the purposes of the qualified mortgage provision.

Comments

Several industry commenters, including several banks, a joint trade association, several state bank associations, and a state credit union association provided comments specific to the Bureau's proposed change to section I.B.2.a. These commenters generally supported the Bureau's proposed changes. Some of these commenters suggested additional changes to sections I.B.2 and I.B.3.

A bank commenter, in stating support for the Bureau's proposed change eliminating language requiring creditors to determine whether overtime and bonus income will continue, and substituting language focusing on a two-year income history, commented that the change would facilitate better access to credit for consumers who rely on overtime and bonus income. Two state bank associations similarly expressed support for the Bureau's proposed change, with one stating that while most employers are not willing to indicate bonus income is likely to continue, they are willing to affirm such bonus payments were paid and if they have ceased to exist. This second bank association commenter stated further that in the absence of confirmation from the employer that a bonus program or overtime is no longer available to an employee, past history is an excellent predictive tool. Another bank commenter, in stating that the Bureau's analysis supporting its proposed change to I.B.2.a on overtime and bonus income was sound, recommended that the formulation for assessing overtime and bonus income in that section be applied to other parts of appendix Q, on different types of income.

A state credit union association commenter stated that while the Bureau's proposed change to section I.B.2.a is adequate to satisfy the qualified mortgage provision, there are still concerns from credit unions that warrant further guidance. Specifically, this commenter requested that the Bureau provide examples of documentation and/or further clarification to assist in determining whether bonus and overtime income is anomalous.

A joint trade association commenter suggested revisions to section I.B.2.a to provide that overtime and bonus income can be used if the consumer has received the income for the past two years and there is no evidence in the loan file that it will not continue. In support of this revision, the commenter stated that the lender should not be in a position to determine that the income will or will not continue. The commenter further stated that the two-year history should satisfy this element on its own absent evidence to the contrary.

A credit union commenter stated that in some lines of work such as nursing, overtime is a standard component of the overall compensation plan. It stated further that the requirement in section I.B.2.a, as revised by the Bureau's proposal, to document and evaluate at least two years of overtime income, could adversely impact certain consumers who are new to their field or recently hired and do not yet have two years of overtime history. The commenter urged the Bureau to reconsider the impact on nurses, firefighters and law enforcement personnel who are just beginning their careers, and to make appropriate adjustments to the proposed revision.

A mortgage lender specializing in the financing of manufactured housing commented on section I.B.2.b, which, in addition to requiring creditors to develop an average of bonus and overtime income for the past two years, states that ''periods of overtime and bonus income less than two years may be acceptable provided the creditor can *justify and document* in writing the reason for using the income for qualifying purposes'' (emphasis added). This commenter stated that without clear direction and guidance from the Bureau as to what justification and documentation would suffice in these instances, lenders will instead choose to exclude this income rather than face regulatory scrutiny and a potential lawsuit for choosing to include the income. A joint trade association commenter suggested several technical edits to I.B.2.b.

Several industry commenters provided comments on section I.B.3. Section I.B.3.a requires a creditor to establish and document an earnings trend for overtime and bonus income and, if either type of income shows a continual decline, to document in writing a sound rationalization for including the income when qualifying the consumer. Section I.B.3.b provides that a period of more than two years must be used in calculating the average overtime and bonus income if the income varies significantly from year to year.

With regard to section I.B.3, a joint trade association commenter suggested removing and reformatting this section as part of a new I.B.2.c and I.B.2.d to provide that eligible bonus or overtime income be calculated as the lesser of the current year or the average of the previous two years, as long as there is no evidence in the loan file that the income will not continue, and the creditor documents in writing a sound rationalization for including the income. This commenter noted that income from bonuses and overtime, commissions and self-employment can be variable and susceptible to significant declines from circumstances within and outside of the control of the consumer. The commenter stated that the revisions it was proposing to this section and others in appendix Q would provide a new and simple qualitative test for determining the amount of income to include in the DTI analysis. The commenter stated that the test would require lenders to use the lesser amount of the average of two

[55] The Bureau's proposed rule preamble at 78 FR 25650 also briefly referred to Bureau changes to section I.B.3. However, this was a typographical error and no Bureau changes were proposed to section I.B.3.

year's past income or the most recent year's earnings.

With specific regard to section I.B.3.b, which states that 'a period of more than two years must be used in calculating the average overtime and bonus income if the income varies significantly from year to year,'' this joint trade association commenter stated that the word ''significantly'' in that section is too vague for a legal standard and will invite litigation. It stated further that lenders should only use the most recent income, not the average, for declining income and provide a rationale for the inclusion of the income. A bank similarly commented on section I.B.3.b, that as the term ''varies significantly'' in that section is not defined that the requirement in that section that a period of more than two years must be used in calculating the average overtime and bonus income either be eliminated or clarified.

Final Rule

The Bureau is adopting the revisions to section I.B.2 regarding overtime and bonus income as proposed. The Bureau believes that the revisions proposed to section I.B.2.a, eliminating language requiring creditors to determine whether overtime and bonus income will continue, and substituting language that states that such income can be used if the consumer has received it for the past two years and documentation submitted for the loan does not indicate this income will likely cease, will facilitate creditor compliance and, as stated by a commenter, better access to credit for consumers who are dependent upon overtime and bonus income. At the same time the Bureau believes that the changes to this section otherwise further the purpose and intent of appendix Q and the qualified mortgage provision through clear requirements for a creditor assessment of the consumer's receipt of the overtime or bonus income for the previous two years, and a review of the loan documentation for indications that the income will likely cease. As some commenters noted, employers may not be willing to indicate if bonus income, for example, is likely to continue, and in the absence of employer confirmation, past history can be used as a predictive tool.

With regard to other proposed changes to section I.B.2.a raised by commenters, such as a suggestion to substitute language that there is no evidence in the loan file that the overtime or bonus income will not continue, or possible changes to address the potential impact of the two-year requirement on new employees who depend on overtime or bonus income, the Bureau believes that the Bureau's revisions strike the right balance between facilitating compliance and ensuring an adequate assessment of consumer income for purposes of the DTI and the ATR requirements. For example, as revised by this final rule, section I.B.2.a provides that bonus or overtime income may be used if the documentation in the loan file does not indicate that the consumer's overtime or bonus income ''will likely cease,'' which is very similar to the language suggested by the commenter. To the extent that the commenter's proposed language would have a different effect, the Bureau believes that the final rule's approach provides clear, objective guidance to creditors that is consistent with the analysis required by the rest of appendix Q. As for the potential impact of the two-year requirement on new employees, the Bureau believes that current section I.B.2.b, as discussed further below, provides creditors with the ability to assess the overtime and bonus income of new employees.

As for comments on sections beyond the Bureau's specific proposed changes to section I.B.2.a, for example with regard to sections I.B.2.b and I.B.3, the Bureau does not believe any changes to those sections are warranted at this time. With regard to section I.B.2.b for example, the Bureau believes that section provides flexibility for creditors to justify and properly document the use of a period of overtime and bonus income of less than two years. The other requirements of section I.B.2.a (that documentation submitted for the loan does not indicate the overtime or bonus income will likely cease) and section I.B.3.a will continue to apply to the income analysis of the consumer. With regard to the comments on section I.B.3, suggesting a removal of that section and a reformatting into a new test in section I.B.2.c. for determining the amount of income to include in the DTI analysis, the Bureau appreciates the comment but believes that sections I.B.2, as amended by this final rule, and I.B.3, provide for a required income analysis consistent with the purposes and intent of appendix Q. Regarding the comments on section I.B.3.b, the Bureau will continue to review this section to determine if further clarification is needed with regard to a creditor determination of whether overtime or bonus income ''varies significantly,'' but is not making any changes at this time. The Bureau needs additional information in order to fully assess whether this standard requires additional clarification for creditors in making the necessary appendix Q determinations, and whether possible alternative standards would be adequate.

I.B.11. Social Security Income

The Proposal

The Bureau proposed several clarifications to the provisions in section I.B.11 of appendix Q as adopted, explaining how to account for Social Security income.

Section I.B.11 as adopted by the ATR Final Rule required that (1) Social Security income either be verified by the Social Security Administration (SSA) or through Federal tax returns; (2) the creditor obtain a complete copy of the current awards letter; and (3) the creditor obtain proof of continuation of payments, given that not all Social Security income is for retirement-aged recipients. The Bureau proposed to amend section I.B.11 to remove the mention of Federal tax returns and instead require only that creditors obtain a benefit verification letter issued by the SSA. In support of this change the Bureau stated its belief that a Social Security benefit verification letter would provide easily accessible proof of the receipt of Social Security benefits and their continuance.

The Bureau also proposed to clarify in section I.B.11 that a creditor shall assume a benefit is ongoing and will not expire within three years absent evidence of expiration. The Bureau stated, in support of this change, its belief that this would provide a more workable and accurate standard for verification of Social Security income.

Comments

Several banks, national and state banking trade associations, a state credit union, and a consumer group submitted comments on the Bureau's proposal to amend section I.B.11 to remove the reference to Federal tax returns and to require creditors to obtain a benefit verification letter. Most industry commenters saw the change as reducing compliance flexibility, and the consumer group requested further changes to protect against falsification of income.

With regard to the industry commenters, a bank trade association stated that it could find no justification for what it saw as eliminating the flexibility of allowing the use of Federal tax returns in the current rule. It stated that while it agreed with the Bureau's explanation for the change, *i.e.,* that a Social Security benefit verification letter would more easily provide proof of the receipt of Social Security benefits and their continuance, the explanation did not provide a reason to eliminate the Federal tax return option. A bank commenter requested that I.B.11 be revised to permit Federal tax returns or other alternative documentation that verifies receipt of Social Security Income. A state banking association commented that in many cases applicants have lost or misplaced their award letters but that they can easily document and verify Social Security income through Federal tax returns and/or monthly bank statements. Another state banking association stated that the Federal tax return option would facilitate compliance. A state credit union commented that it was concerned that limiting verification to a benefit verification letter could facilitate discrimination. Another state credit union trade association, in stating its concern about the supposed elimination of the Federal tax return option, stated that it could delay the lending process as a result of consumers who cannot locate their Social Security benefit verification letter and who therefore need to request a copy from the SSA, resulting in a potential increased workload for the SSA. A credit union commenter, in recommending the Federal tax return option, stated that sole reliance on the Social Security benefit verification letter could pose a potential risk of fraud through a modification of the letter by the recipient before it is received by the lending institution.

One bank commenter stated that it supported the Bureau's proposal to require creditors to obtain a Social Security benefit verification letter to verify Social Security income, but recommended the adoption of language acknowledging that creditors may obtain federal tax returns in addition to verification letters. This commenter noted that tax returns may be useful to creditors to determine an applicable tax rate used to gross up non-taxable Social Security income, and that they may be needed to verify income received other than from Social Security. This commenter also stated its support for the Bureau's proposed clarification providing that Social Security income shall be assumed not to expire within three years, absent evidence of expiration, stating that it would reduce potential barriers to accessing credit for Social Security income recipients, while providing creditors clear guidance to mitigate fair lending risk.

A consumer group commenter stated that so long as the documentation requirements for Social Security income require that the Social Security benefit verification letter come directly from the SSA, this documentation is sufficient. It noted, however, that if the verification letter is delivered to the lender through a broker or originator working for the lender, this is not sufficient documentation as it may become a vehicle for falsification of income. The commenter therefore recommended that section I.B.11 be revised to require creditors to use either tax returns or bank statements showing the deposit of benefits into the bank account, in addition to requiring a verification letter—where the verification letter cannot be obtained directly from the government payor. The commenter noted that the additional information will provide more substantial verification in a form that is still readily available to applicants. It concluded on this point that this approach will ensure that homeowners have easy access to needed income documentation without providing a means for public benefit documentation to be used to inflate income on a loan. This commenter also suggested, referring to section ii of the notes to section I.B.11 (which allows some portion of Social Security income to be ''grossed up'' if deemed non-taxable by the IRS), that the Bureau should specify that grossing up of Social Security benefits should be done based on a tax bracket that is appropriate for the income received. It stated further on this point that the language currently in I.B.11 will lead to and support the existing practice of grossing up that allows, rather than prevents, many unaffordable loans, as many homeowners who receive Social Security benefits have their income grossed up to the top tax bracket.

Final Rule

The Bureau is adopting the revisions to section I.B.11 as proposed. The Bureau believes that the Social Security benefit verification letter provides the best method of verifying receipt of Social Security income by the consumer and its continuance. The Bureau understands the concerns expressed by various industry commenters regarding the potential limitation on compliance flexibility resulting from the removal of the supposed option to verify Social Security income through Federal tax returns. The Bureau notes, however, that section I.B.11 as adopted in the 2013 ATR Final Rule required, in addition to income verification by the SSA or Federal tax returns, a complete copy of the current awards letter, and documented continuation of payments. The proposed revisions to section I.B.11 simplify these requirements by providing that one document—the Social Security benefit verification letter—satisfies all needs for documentation. A Federal tax return is of less value in demonstrating a consumer's continued receipt of Social Security income and would not be available for consumers who only recently began to receive Social Security benefits. Section I.B.11 as revised by the final rule specifically provides that if the Social Security benefit verification letter does not indicate a defined expiration date within three years of loan origination, the creditor must consider the income effective and likely to continue. The consumer's bank statements, suggested by some commenters as an alternative means to verify income, also are of less value in demonstrating continuance of receipt. The Bureau notes moreover that continuing to require the Social Security benefits letter to verify that such benefits are not likely to cease parallels the general requirement of employer verification of current, ongoing employment.

As far as the concern expressed by a commenter that the Social Security benefit verification letter could become a vehicle for falsification of income if not required to be received directly from the government payor—and in which case it was suggested that tax returns or bank statements be required as additional verification—the Bureau believes that effective due diligence by creditors will limit such a possibility. The Bureau expects that creditors will exercise the same due diligence against fraud with regard to their review of Social Security benefit verification letters that they apply in their review of any mortgage loan related documents submitted to them. With regard to the comments received expressing concern about consumers who are unable to locate their Social Security Benefit verification letters, it is the Bureau's understanding that benefit verification letters may be requested on-line or over the phone toll-free from the SSA or from a local SSA office.

Finally, with regard to the comment requesting that the Bureau put limitations on the grossing up of Social Security benefits (as permitted under section I.B.11 in some instances), the Bureau is not addressing that issue at this time, as this requires further review and consideration. Other commenters made suggestions for changes with regard to section II.E, Non-Taxable and Projected Income, and the gross-up rate allowed for non-taxable income generally (discussed later in this preamble) which, in addition to Social Security income, includes Federal government employee retirement income, State government retirement income, military allowances, as well as other types of income. The Bureau needs additional time to fully consider and evaluate the implications of these comments, including those specifically related to Social Security income, to ensure consistency with and furtherance of the purposes of appendix Q.

C. Section I.D. General Information on Self-Employed Consumers and Income Analysis

The Proposal

Section I.D of appendix Q, as adopted, permitted income from self-employed consumers to be considered income for the purposes of the DTI calculation if certain criteria were met, including various documentation requirements and analysis of the financial strength of the consumer's business. The documentation requirements in section I.D.4 included the requirement to provide a ''business credit report for corporations and 'S' corporations.'' The analysis of the financial strength of the business in section I.D.6 required that the creditor carefully analyze the ''source of the business's income'' and the ''general economic outlook of similar businesses in the area.'' Following the publication of appendix Q the Bureau received inquiries from stakeholders concerning these requirements and also noted compliance difficulties and increased risk of litigation that could arise from them. Industry raised specific concerns that business credit reports can be expensive and difficult to obtain, and that a requirement to assess economic conditions for geographic areas can be both costly and difficult, as well as imprecise.

The Bureau proposed to make several amendments to these income stability requirements for self-employed consumers. The Bureau's first proposed amendment eliminated the requirement in current section I.D.4 that self-employed consumers provide a business credit report for corporations and ''S'' corporations. In proposing this amendment the Bureau stated that it recognized that business credit reports for many smaller businesses can be difficult or very expensive to obtain. The Bureau also stated its belief that while these reports may provide some valuable information for the purposes of an underwriting analysis, they are less suited to function as a requirement to determine income for self-employed consumers.

The Bureau's second proposed amendment eliminated two requirements under the requirement to analyze a business's financial strength in section I.D.6. Section I.D.6, as adopted, required creditors (1) to evaluate the sources of the business's income and (2) to evaluate the general economic outlook for similar businesses in the area. In proposing this amendment the Bureau stated its belief that both of these requirements demand that the creditor engage in complex analysis without providing clarity concerning what types of evaluations are satisfactory for the purpose of complying with the rule. The Bureau also stated that such a provision is better suited to function as part of an underwriting analysis subject to waiver, variance, and guidance rather than a regulatory rule.

The Bureau's proposal also made technical revisions to section I.D to accommodate removal of these requirements.

Comments

Industry commenters—several banks and national and state trade associations—submitted comments on the Bureau's proposed changes to sections I.D.4 and I.D.6. The commenters generally supported the Bureau's proposals.

A bank stated that it agreed with the Bureau's proposals to eliminate the requirement for business credit reports, citing the potential difficulty and expense associated with obtaining such reports. The bank stated that requiring a business credit report could increase the cost of credit or restrict access to credit for self-employed consumers. The bank also noted that appendix Q requires creditors to obtain year-to-date profit and loss statements and balance sheets from self-employed consumers, and suggested, in the alternative, that creditors be permitted to accept quarterly tax filings if the consumers most recent tax return is greater than four months old. This commenter also stated its agreement with the Bureau's proposal to eliminate creditor requirements to evaluate both the sources of consumer's business income and the general economic outlook for similar businesses in the area stating that it agreed with the Bureau's conclusion that such requirements are ill-suited to a regulatory rule designed for consumer transactions. The commenter added further that such requirements are too subjective for purposes of establishing documentation standards for income.

Another bank commenter expressed support for the Bureau's proposed elimination of the business credit report requirement in section I.D.4, and with regard to the Bureau's proposed elimination of the creditor requirements in section I.D.6 stated that it agreed that requiring creditors to analyze a business's financial strength is beyond the scope of the DTI standard. This commenter suggested the removal of section I.D.6 entirely from appendix Q, stating that the type of determination required by this section is highly subjective and that such subjectivity greatly undermines the certainty presumed to be tied to a safe harbor test. This commenter also suggested a change to section I.D.4.c to make clear that profit and loss statements will only be required if quarterly tax returns are not available.

A joint trade association commenter also suggested the entire deletion of section I.D.6, stating that subjective criteria should be removed in favor of documented income. This commenter also supported the elimination of the business credit report requirement in section I.D.4.d. It also suggested changes to section I.D.4.c, stating that profit and loss statements and balance sheets should only be required if they are needed because quarterly taxes are not available.

Two state banking association commenters also supported the Bureau's proposal to eliminate the requirements in section I.D.4.d, and I.D.6. One association, with regard to section I.D.4.d, noted that credit reports for small businesses can be difficult to obtain and quite expensive. The other association stated, with regard to I.D.6, that the creditor requirements proposed to be eliminated by the Bureau in that section would be inherently difficult for creditors to make and would carry no indication of accuracy. A state credit union association also expressed support for the Bureau's changes in these sections.

A national trade association that represents real estate agents commented that it supported the Bureau's proposals eliminating the requirements relating to self-employed consumers in I.D.4.d and I.D.6, stating that it agreed with the Bureau's assessment that these requirements are too expensive and complex, and without clarity. This commenter also suggested additional clarifications beyond the Bureau's proposals, to section I.D and section I.B.7, as those sections relate to many of its members who work as self-employed contractors working in association with real estate brokers, not as employees. In particular this commenter requested additional clarity on how creditors should consider real estate commission income.

Final Rule

The Bureau is adopting its revisions to section I.D.4 and I.D.6 as proposed.

With regard to the revisions to section I.D.4, and the elimination from the documentation requirements for self-employed consumers business credit reports for corporations and ''S'' corporations, the Bureau recognizes the concerns expressed by commenters regarding the expense associated with obtaining such reports, and agrees with commenters that this additional expense could increase the cost of credit or restrict access to credit for self-employed consumers.

With regard to the Bureau's revisions to section I.D.6 and the elimination of the requirements that creditors evaluate sources of the consumer's business income, and the general economic outlook for similar businesses in the area, the Bureau agrees with commenters who noted the subjective nature of these requirements, and recognizes the difficulty for creditors in making these assessments. The Bureau believes that these requirements are better suited to a flexible underwriting analysis than a regulatory rule. With regard to those commenters who recommended the elimination of section I.D.6 in its entirety, the Bureau believes that the revisions to that section adopted by the Bureau significantly improve this requirement as an assessment of the business's financial strength, and make this an effective and useful measure for purposes of the DTI analysis. Furthermore, the standard as revised is straightforward for creditors, *i.e.,* annual earnings that are stable or increasing are acceptable, while income from businesses that show a significant decline in income over the analysis period is not acceptable.

The Bureau notes the other changes to these sections beyond the Bureau's specific proposals recommended by some commenters, including, for example, that creditors be permitted to accept quarterly tax filings as an alternative to profit and loss statements and balance sheets under section I.D.4.c, and additional clarification on self-employed contractors, and real estate commission income, under I.D. and I.B.7. The Bureau appreciates those recommendations, but will need to fully evaluate them for purposes of consistency with and furtherance of the purposes of appendix Q, and the implications for all stakeholders.

II. NON-EMPLOYMENT RELATED CONSUMER INCOME

A. Section II.B. Investment and Trust Income

The Proposal

Section II.B.2 of appendix Q as adopted permitted trust income to be considered income for the purposes of the DTI calculation ''if guaranteed, constant payments will continue for at least the first three years of the mortgage term.'' Appendix Q then provided a list of required documentation consumers must provide but did not otherwise specify the universe creditors must review to make and support the three-year determination.

The Bureau proposed an amendment to this section to delineate more clearly the breadth of the analysis for trust income by specifying that the analysis is limited to the documents appendix Q requires. Specifically, the proposal revised ''if guaranteed, constant payments will continue for at least the first three years of the mortgage term'' by adding ''as evidenced by trust income documentation.'' Under the requirements in section II.B.2 as adopted, there was no specific cut-off for the amount of diligence required or information that must be collected to satisfy the requirement. The Bureau stated its belief in proposing the amendment that it would facilitate compliance and help ensure access to credit by making the standard clear and easy to apply.

Section II.B.3.a of appendix Q as adopted required, for notes receivable income to be considered income, that the consumer provide a copy of the note and documentary evidence that payments have been consistently made over the prior 12 months. If the consumer is not the original payee on the note, however, section II.B.3.b required the creditor to establish that the consumer is ''now a holder in due course, and able to enforce the note.'' The Bureau proposed an amendment to eliminate the requirement that the consumer be a holder in due course, which requirement the Bureau believed may require further investigation than is necessary to establish that the income is effective for the purposes of the rule. The proposal would have amended appendix Q to require only that the consumer is able to enforce the note.

Comments

Industry commenters who submitted comments on the Bureau's proposal to revise section II.B.2 of appendix Q either supported the changes or requested additional clarification on existing language in the section.

A bank commenter, for example, stated that the change to section II.B.2.a concerning trust income provided clearer guidance with respect to the required documentation, and would help facilitate continued access to credit for recipients of such income. This commenter expressed concerns, however, with the requirement that trust income be ''guaranteed'' and recommended its elimination. This commenter stated that while trust income documentation may provide insight into periods of likely income continuance, it is unclear as to whether such documentation would provide evidence of an absolute guarantee of payment. Other commenters similarly objected to the word ''guaranteed.'' Another bank commenter stated that while it agreed with the Bureau's proposed changes to limit the analysis for trust income only to trust documentation, it encouraged the Bureau to remove ''guaranteed'' as it seems to imply that documentation will be available in the form of a guarantee or that an individual can be requested to provide such a guarantee. This commenter stated that the creditor should be expected to review the trust documentation to ensure the income is not clearly scheduled to end in the first three years of the mortgage. A joint trade association commenter also suggested the deletion of the word ''guaranteed'' in this section, stating that it is unclear who would provide the guarantee, and that this is not in keeping with current practice. A state banking association stated that it supported the Bureau's proposed addition of the phrase ''as evidenced by the trust income documentation'' to section II.B.2.a so long as the provision regarding required trust income documentation allows for the consumer to provide a trustee's statement confirming the amount of the trust, frequency of distribution and duration of payments. This state banking association commenter stated that reliance on a trustee's statement would allow its state's banks to take advantage of the protection afforded by state law (rather than having to collect a complete copy of the trust agreement).

With regard to the Bureau's proposed changes to section II.B.3, a bank commenter agreed with the Bureau's proposal to eliminate the requirement for creditors to establish that consumers are holders in due course if the consumer is not the original payee on the note. This commenter noted that creditors will be required to obtain a copy of the note, which should generally be sufficient to establish enforceability. This commenter also recommended shortening the documentation period to evidence consistency of payment receipts in section II.B.3.b from 12 months to six months. Finally, this commenter stated that the list of acceptable documentation in section II.B.3.b to establish that evidence of receipt of notes receivable (*i.e.,* deposit slips, cancelled checks or tax returns) is too restrictive, and does not take into account other common electronic payment methods. The commenter recommended modifying the list of acceptable documentation types to include, but not be limited to, deposit slips or receipts, cancelled checks, bank statements or tax returns. A joint trade association and a bank also recommended expansion of the list of acceptable documentation in section II.B.3.b to include bank statements and other deposit accounts, as electronic payments are an increasingly common way to transfer money regularly between consumers.

Final Rule

The Bureau is adopting the revisions to sections II.B.2 and II.B.3 as proposed with two modifications. The changes proposed by the Bureau to both sections were generally accepted by commenters. However, with regard to section II.B.2 the Bureau agrees with commenters that the use of the word ''guarantee'' in that section, *i.e.,* that income from the trust may be used if ''guaranteed'' constant payments will continue, is unclear and should be eliminated. The Bureau believes that the requirement for creditor evaluation of the trust documentation, with proper due diligence by the creditor in the review of such documentation, is sufficient to meet the requirement in section II.B.2 with regard to the continuance of the trust income. With regard to the state banking association commenter recommending that required trust documentation include a trustee's statement, the Bureau notes that section II.B.2 specifically provides that ''required trust documentation'' includes a trustee statement confirming the amount of the trust, the frequency of the distribution, and the duration of payments.

With regard to section II.B.3, the Bureau agrees with the commenters that suggested a modification of the list of acceptable documentation in section II.B.3.ii to take into account common electronic payment methods. The Bureau is therefore modifying this list to include, in addition to deposit slips, cancelled checks and tax returns, also deposit receipts and bank or other account statements. Finally, with regard to the comment recommending shortening the documentation period in section II.B.3.b from 12 months to six months, the Bureau appreciates the comment but believes this requires further evaluation to ensure consistency with the purposes of appendix Q and the ATR Final Rule.

B. Section II.D. Rental Income

The Proposal

Appendix Q, as adopted, allowed creditors to consider certain rental income payable to the consumer taking out the loan for the purposes of the DTI calculation in section II.D. Section II.D.3.a stated that it is not acceptable to consider income from roommates in a single-family property occupied as the consumer's primary residence as ''income'' for the purposes of determining the consumer's DTI, but that it is acceptable to consider rental income payable to the consumer from boarders related by blood, marriage, or law. The Bureau originally adopted this provision of appendix Q for consistency with existing FHA standards used by industry.

Following publication of the 2013 ATR Final Rule, the Bureau became aware of concerns regarding requirements that boarders be related to the homeowner in order for rental income payable to the consumer to be considered ''income'' for DTI purposes. The Bureau did not believe that the relation requirement was useful in determining whether or not the rental income should be used in determining DTI. The Bureau therefore proposed to eliminate the requirement that boarders be related by blood, marriage, or law from section II.D.3.a.

Comments

Commenters generally supported the Bureau's proposed change to section II.D.3.a, eliminating the prohibition on considering rental income payable to a consumer from boarders in a single-family property who are not related by blood, marriage or by law. Various commenters recommended further clarifications to this section.

A joint trade association commenter in recommending the same change to section II.D.3.a. as proposed by the Bureau, stated that rental income evidenced on tax returns should be given equal treatment regardless of the relationship status of renters. Another national trade association commenter stated that it generally agreed with the Bureau's proposed changes to this section, but that it believed that the guidelines need to be further modified to be workable. Specifically this commenter stated that the requirements as currently written will be difficult to administer because they depend on distinctions and varying definitions of the terms ''roommate'' and ''boarder.'' The commenter noted that these terms are not defined in the regulation, and they have no set meaning in law or custom. The commenter stated that it did not believe that these regulations should impose or dictate the types of habitation agreements that people choose to enter. A state bank association commenter noted that the Bureau's proposal retains the prohibition on using rental income paid by roommates, and that neither the rule nor appendix Q provides a definition of roommate or boarder. Stating that the provision to limit rental income to boarders is unnecessarily restrictive, the commenter requested that creditors be permitted to consider rental income received from roommates or boarders, provided such income is shown on the applicant's tax return. A similar comment from another state bank association stated that if the distinction between rental income received from roommates and boarders is retained it requested that the Bureau define within the regulation the terms ''roommate'' and ''boarder.''

Final Rule

The Bureau agrees with those commenters on the Bureau's proposed revisions to section II.D.3 that the requirements as proposed would be difficult to administer and comply with as they depend on distinctions between ''roommate'' and ''boarder'' which are undefined terms in that section, and in appendix Q generally. The Bureau believes that rental income established through tax returns is the relevant factor for purposes of a DTI analysis, and that the distinction between the terms roommate and boarder is not relevant to that determination. Therefore the Bureau is modifying section II.D.3.a to eliminate the prohibition on the acceptability of income from roommates in a single family property occupied as the consumer's primary residence, and to provide that income from either roommates or boarders is acceptable. The Bureau retains the section II.D.3.b requirement that rental income may be considered effective if shown on the consumer's tax return, and states further that, if not on the tax return, rental income paid by the roommate or boarder may not be used in qualifying.

Clarifications and other Technical Changes

As noted above, the Bureau proposed various other technical and wording changes in appendix Q, for consistency and clarification. The Bureau is adopting those revisions as proposed.

Comments on Aspects of Appendix Q beyond Bureau's Specific Proposals

As noted previously, various commenters submitted comments on aspects of appendix Q that were not the subject of the Bureau's specific proposals, including suggestions for significant revisions to appendix Q. Those comments are summarized and addressed below.

Adopt or Allow Use of GSE Guidelines

Several banks and a joint trade association commenter recommended that the Bureau either allow creditors to use GSE guidelines in certain instances not addressed by appendix Q, or to look to and adopt certain existing GSE guideline language. Specifically, one bank commenter urged the Bureau to expressly allow creditors to use GSE guidelines for any matter not addressed by appendix Q, as GSE guidance is widely used by industry and is consistent with prudent underwriting. This commenter stated, for example, that appendix Q does not specify how to annuitize assets, but that GSE guidance spells out how to annuitize a consumer's assets in qualifying a borrower. It also stated that, as a general matter, appendix Q should be revised to allow creditors to ''add back'' amounts deducted from a borrower's income, consistent with a Fannie Mae worksheet. This commenter also noted several other specific areas where adoption of GSE guidance on add-backs was requested, for example, certain add-backs permitted by the GSEs with regard to section I.E. Income Analysis: Individual Tax Returns (IRS Form 1040); and with regard to section II.D.5. Rental Income, Analyzing IRS Form 1040 Schedule E. In addition this commenter recommended with regard to section II.E.4. Projected Income for a New Job, adoption of the GSEs' approach in assessing the projected income of certain teachers. A joint trade association commenter similarly recommended replacing, for reasons of clarity, appendix Q language in section I.B.12. Automobile Allowances and Expense Account Payments, with GSE guidance, and replacing language in sections I.E, F, G and H with a requirement to follow GSE guidelines for self-employed cash flow analysis, including the use of several GSE forms, and the adoption of GSE requirements in section II.E.2. Adding Non-Taxable Income to a Consumer's Gross Income. This commenter also recommended that appendix Q follow current GSE guidelines for an identified list of areas where it stated appendix Q is silent and where it was seeking additional clarity.

Another bank commenter stated that there are instances in which the Appendix Q guidelines fail to reflect the level of detail needed to underwrite in the current mortgage market, and noted that the GSEs have adopted guidelines which provide greater detail and in some instances would be clearer and better suited to setting a regulatory requirement. This commenter encouraged the Bureau to review certain specifically identified sections of the GSE guidelines which it stated might provide more clarity than the present appendix Q rules. This commenter stated, however, that it was not recommending that the Bureau defer to the GSE guidelines which are subject to change without opportunity for notice and comment. It requested the Bureau review, for example, GSE guidelines with regard to ''income from other sources'' in section I.B.1.b, giving as an example GSE guidelines on documenting of tips and foreign income. Like the previously discussed commenters, it also suggested review of sections I.E, F, G and H.

Generally Revise Appendix Q to Eliminate Subjective Determinations

Several commenters suggested major revisions to appendix Q to address what the commenters viewed as standards that require creditors to make subjective determinations on a consumer's debt and income. For example, a joint trade association commenter stated that it was concerned that appendix Q mandates a calculation of DTI that will require lenders to establish essentially a manual underwriting process due to the numerous subjective determinations prescribed by the rule. It stated further that if qualified mortgages will comprise a significant fraction of mortgage originations, the proper calculation of DTI under appendix Q must be able to be incorporated into an automated underwriting system. The commenter therefore urged the Bureau to revise appendix Q to minimize the requirements for subjective determinations by lenders and to provide sufficient certainty to allow its integration into automated underwriting systems. It stated further that, for appendix Q to be an effective bright-line rule, the application of appendix Q should ideally deliver the same result regardless of the lender implementing it. However, the commenter noted, to do that would mean requirements for quantitative inputs, with supporting documentation, that eliminate any need for subjective determinations. This commenter concluded that appendix Q will be relied upon to verify the sufficiency of the lender's determination whether a loan is a qualified mortgage and should be able to be conclusively proven by written evidence, such as a loan file, in a court of law. This commenter supplemented its comment with a detailed chart with suggested revisions and comments on the Bureau's proposals, and on a number of other appendix Q provisions beyond the Bureau's specific proposals.

A bank commenter echoed the comments of the joint trade association commenter that appendix Q needs to be revised to remove requirements for subjective determinations. This commenter stated, however, that it believes the structure and form of appendix Q can be retained while making tailored changes to its provisions as necessary to allow it to serve the intended purposes of appendix Q and the ATR Final Rule. A lender specializing in manufactured housing financing requested that the Bureau examine all of appendix Q with the goal of providing clarity and reducing litigation, and commented further that in order to incentivize lenders to gravitate towards qualified mortgages, the guidelines for making a qualified mortgage must be as objective as possible. To that end this commenter stated that should the Bureau ultimately decide not to remove the DTI requirements and appendix Q, it should amend certain sections of appendix Q that the commenter believes may not function properly as regulations.

A GSE commenter recommended that the Bureau treat appendix Q as guidance rather than regulation that is subject to notice and comment rulemaking as it is the commenter's opinion that there are provisions of appendix Q that are not properly suited to be regulations. This commenter stated that such guidance could be revised as needed, and in relatively short order, in response to changing market conditions and industry practices, and that, in contrast, if appendix Q remains as a regulation subject to notice and comment it loses such flexibility. Another GSE commenter also recommended that the Bureau issue appendix Q in the form of a handbook or other written guidance, akin to the manner in which FHA provides underwriting standards to lenders, citing the Bureau's loss of flexibility and ability to respond promptly, if appendix Q remains a regulation subject to notice and comment rulemaking.

A consumer group commenter stated that while it supported the Bureau's proposed clarifications to appendix Q it recommended that the Bureau go further to clarify it in a way that is consistent with automated underwriting. This commenter stated further that while manual underwriting is used by some lenders, lenders should not be required to underwrite in this manner simply to comply with the definitions of debt and income included in appendix Q.

Other Comments on Aspects of Appendix Q beyond the Bureau's Proposals

In addition to the comments discussed above, various commenters had comments on certain specific sections in appendix Q, relating to matters not included in the Bureau's proposals. As noted, a joint trade association commenter supplemented its comment letter with a detailed chart of suggested changes to a variety of appendix Q sections both with regard to sections which were included in the Bureau's specific proposals, and sections that were not included. Various bank commenters stated that they endorsed the comments made by this commenter. Included in the joint trade association commenter's suggested changes of sections outside of the Bureau's proposals, for example, were changes to sections II.A. Alimony, Child Support, and Maintenance Income Criteria; II.C. Military Government Agency and Assistance and Program Income; and III.2. Debt to Income Ratio Computation for Recurring Obligations. As discussed above, this commenter also identified a list of areas where it stated appendix Q is silent and where it was seeking additional guidance. In its comment letter, this commenter also suggested a new quantitative test for determining the amount of consumer income to include in the DTI analysis, which it suggested not only be applied to overtime and bonus income, but other income analysis in appendix Q as well. Another Bank association commenter identified various areas with regard to sources of income that it stated appendix Q did not address, or did not adequately address, and for which it was seeking additional clarification, including, for example, asset amortization, stock options, capital gain income, foreign income, relocation earnings, and contractor and other irregular income situations. This commenter also requested additional guidance on section I.C. Consumers Employed by a Family Owned Business, and suggested changes with regard to section II.E. Non-Taxable and Projected Income to allow creditors to use a 25 percent ''gross-up'' rate for all non-taxable income. Other commenters that raised issues on sections outside of those sections that were the subject of the Bureau's specific proposals included a consumer commenter that recommended that the 12-month maximum for defining projected obligations (in section V.1) should be extended for loans with predictable repayment requirements and inflexible repayment terms, such as private student loans and student loan repayment programs.

Response to Comments on Aspects of Appendix Q beyond Bureau's Specific Proposals

The Bureau appreciates the comments received on other aspects of appendix Q that were not the subject of the Bureau's specific proposals. These comments will assist the Bureau in its efforts to ensure the continuing effectiveness and utility of appendix Q as a part of the DTI analysis.

The Bureau notes that a substantial number of industry commenters cited particular areas of appendix Q that they asserted either provided no guidance, or insufficient guidance, to enable creditors to make the required income and debt determinations. As described above, many of these commenters suggested that the Bureau adopt, allow creditors to use, or look to GSE guidelines with regard to certain types of income and/or debt not specifically addressed by appendix Q in order to, in effect, provide a means for filling this gap. The Bureau believes in general that the long history and experience of other federal agencies as well as the GSEs in matters addressed by appendix Q can be helpful in this context and acknowledges that requirements established by the other federal agencies and the GSEs already play a significant role in the mortgage market.

Indeed, the Bureau notes that the temporary qualified mortgage status established by the ATR Final Rule provides creditors with the option to issue qualified mortgages without relying on the standards set forth in Appendix Q. Under Section 1026.43(e)(4), creditors who prefer federal agency or GSE underwriting rules can use those rules to obtain qualified mortgage status by ensuring that, among other things, their loans either are eligible for purchase or guarantee by the GSEs or to be insured or guaranteed by the agencies.

The Bureau notes further, however, that while appendix Q does not specifically refer to every possible type of debt or income, it does set forth basic guidelines for the treatment of debt and income. Section I of appendix Q addresses consumer employment related income, and section I.B.1 sets out standards for analysis of salary, wage, and other consumer employment related income. Section I.B.1.b provides that income from sources other than salaries or wages ''can be considered as effective'' when it is ''properly verified and documented by the creditor.'' This provision sets the rule for the treatment of types of income whose treatment is not otherwise more specifically addressed by appendix Q. Likewise, section III.2.a provides as a general rule that recurring charges extending ten months or more for specified recurring obligations and ''other continuing obligations'' must be treated as debt.

In light of these circumstances, the Bureau has revised the introduction to appendix Q to make two points. First, where guidance issued by federal agencies including the U.S. Department of Housing and Urban Development, the U.S. Department of Veterans Affairs, the U.S. Department of Agriculture, or the Rural Housing Service, or issued by the GSEs, Fannie Mae and Freddie Mac, while operating under the conservatorship or receivership of the Federal Housing Finance Agency, or issued by a limited-life regulatory entity succeeding the charter of either Fannie Mae or Freddie Mac (collectively, Agency or GSE guidance) is in accordance with appendix Q, creditors may look to that guidance as a helpful resource in applying appendix Q. Thus, where only the broad principle contained in section I.B.1.b applies to a particular type of income, a creditor may look to Agency or GSE guidance that is in accordance with appendix Q's standards in determining whether that income has been properly documented and verified. For example, appendix Q does not specifically address additional steps a creditor might take to document and verify wage or salary income when it is earned from foreign sources and paid in foreign currency. Agency or GSE guidance may therefore be used to provide more specific standards with regard to verification or calculation of such income, as long as the guidance used is not inconsistent with the requirements of appendix Q. Similarly, where the treatment of a particular recurring obligation is not specifically addressed in appendix Q, the creditor may look to Agency or GSE guidance for purposes of determining how to assess that obligation, as long as that guidance is in accordance with the requirements of section III of appendix Q.

Second, in the event that there may be consumer situations that present questions that appendix Q simply does not presently address at all, the Bureau is adding language to the introduction providing that when the standards contained in appendix Q do not resolve the treatment of a specific kind of debt or income, the creditor may either (1) exclude the income or include the debt, or (2) treat the income or debt in accordance with guidance issued by the federal agencies or GSEs. The introduction makes clear, however, that the Bureau expects that the above-described default rule on excluding income and including debts and the optional safe harbor reliance on GSE or Agency guidance will be used sparingly. The introduction emphasizes that the creditor may not rely on Agency or GSE guidance to reach a resolution contrary to that provided by appendix Q's standards, even if the Agency or GSE guidance specifically addresses the particular type of debt or income but the appendix Q standards are more generalized. For clarity, the introduction provides a definition for when appendix Q's standards resolve the appropriate treatment of a specific kind of income or debt: where the appendix Q standards provide a discernible answer to the question of how to treat the debt or income. Under this definition, the Bureau believes that the use of the default rule or the optional safe harbor should only rarely be necessary. Thus, while the Bureau's revisions to appendix Q reflect commenters' concerns about the possibility of gaps in appendix Q, the Bureau emphasizes that as revised by this final rule, the introduction to appendix Q only allows creditors to use Agency or GSE guidance whenever appendix Q does not resolve how to treat a particular type of debt or income (or where such guidance is used in applying appendix Q consistent with its standards, as discussed above). Add-backs to income permitted by Agency or GSE guidance, for example, are not permitted by appendix Q except in accordance with its standards.

With regard to the request by some commenters for a major revision to appendix Q, including, for example, the removal of all requirements for subjective determinations, the Bureau believes that the revisions made by today's final rule, including the default rule and the optional safe harbor just described, will provide creditors with the means necessary to effectively carry out the analysis required by appendix Q. The Bureau will continue to review the implementation of appendix Q to ensure that creditors can readily comply with its requirements, but the Bureau believes that, with today's final rule, appendix Q currently meets that standard.

As discussed, some commenters suggested that the appendix Q requirements be revised to allow its integration into automated underwriting systems. After the Bureau's rules go into effect in January 2014, the Bureau, in reviewing the implementation of those rules, including the ATR Final Rule, will give additional consideration to the suggestions raised by these commenters. In the meantime, the Bureau believes that the temporary qualified mortgage provisions established by the ATR Final Rule should provide the needed flexibility for creditors. Regarding the comments suggesting that the Bureau treat appendix Q as guidance rather than as a regulation subject to notice and comment in order to respond to changing market conditions and industry practices, as previously stated, the Bureau ''did not intend for appendix Q to function as a general flexible underwriting policy for assessing risk (as it is used by FHA in the context of insurance), and recognizes that the Bureau will not have the same level of discretion regarding the application of appendix Q.'' [56] Indeed, the Bureau believes that appendix Q could not fully serve its intended purpose of providing clarity and certainty as to the DTI determination were it treated as guidance. Moreover, the Bureau believes that appendix Q, particularly as clarified and revised by today's final rule, provides creditors with sufficient and appropriate standards for assessing the income and debt of consumers.

V. Effective Date

The amendments in this rule are effective January 10, 2014, except for the change to § 1026.35(e). The amendment to § 1026.35(e) is effective immediately on publication of this rule in the **Federal Register**. As explained above, this amendment clarifies the Bureau's interpretation of § 1026.35(e); it is therefore an interpretive rule, for which an immediate effective date is appropriate. In addition, the Bureau concludes that good cause exists to make the amendment effective immediately. The clarification will provide certainty to the industry and imposes no obligations with which mortgage lenders must comply.

Applicability date. The amendment to § 1026.35(e) applies to any transaction consummated on or after June 1, 2013, and for which the creditor receives an application on or before January 9, 2014.

VI. Section 1022(b)(2) of the Dodd-Frank Act

A. Overview

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts.[57] In addition, the Bureau has consulted, or offered to consult with, the prudential regulators, SEC, HUD, VA, USDA, FHFA, the Federal Trade Commission, and the Department of the Treasury, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

As noted above, this rule makes amendments to some of the final mortgage rules issued by the Bureau in January of 2013.[58] These amendments clarify, correct, or amend provisions on (1) the relation to State law of Regulation X's servicing provisions; (2) implementation transition requirements for adjustable-rate mortgage disclosures; (3) the small servicer exemption from certain of the new servicing rules; (4) exclusions from the repayment ability and prepayment penalty requirements for higher-priced mortgage loans (HPMLs); (5) the use of government-sponsored enterprise (GSE) and Federal agency purchase, guarantee or insurance eligibility for determining qualified mortgage (QM) status; and (6) the determination of debt and income for purposes of originating QMs. In addition to these revisions, which are discussed more fully below, the Bureau is also making certain technical corrections to the regulations with no substantive change intended.

The analysis in this section relies on data that the Bureau has obtained and the record established by the Board and Bureau during the development of the 2013 Title XIV Final Rules. However, the Bureau notes that for some analyses, there are limited data available with which to quantify the potential costs, benefits, and impacts of this final rule. In particular, the Bureau did not receive comments specifically addressing the Section 1022 analysis in the proposed rule. Still, general economic principles together with the limited data that are available provide insight into the benefits, costs, and impacts and where relevant, the analysis provides a qualitative discussion of the benefits, costs, and impacts of the final rule.

B. Potential Benefits and Costs to Consumers and Covered Persons

The Bureau believes that, compared to the baseline established by the final rules issued in January 2013,[59] the

[56] 78 FR 25648.

[57] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

[58] For convenience, the reference to these January 2013 rules is also meant to encompass the rules issued in May 2013 that amended the January rules, including the final rule amending the 2013 Escrows Final Rule, issued on May 16, 2013.

[59] The Bureau has discretion in any rulemaking to choose an appropriate scope of analysis with respect to potential benefits and costs and an appropriate baseline.

primary benefit of most of the provisions of the final rule to both consumers and covered persons is an increase in clarity and precision of the regulations and an accompanying reduction in compliance costs.

More specifically, the provisions that clarify: (1) That the preemption provisions in Regulation X do not preempt the field of regulation of the practices covered by RESPA and Regulation X; (2) the timing of required disclosures for adjustable-rate mortgages; and, (3) the exclusion of construction loans, bridge loans, and reverse mortgages from the requirements of the ability-to-repay and prepayment penalty provisions in § 1026.35(e) generally conform the rules to the policies articulated by the final rules already issued. The discussion of benefits, costs, or impacts discussed in part VII of each of the January rules included consideration of each of these provisions.

The final rule also modifies the text of the Regulation Z servicing rule to clarify the scope and application of the small servicer exemption. Specifically, it clarifies the application of the small servicer exemption with regard to servicer/affiliate and master servicer/subservicer relationships and excludes mortgage loans voluntarily serviced for an unaffiliated entity without remuneration, reverse mortgage transactions, mortgage loans secured by consumers' interest in timeshare plans, from being considered when determining whether a servicer qualifies as a small servicer. In total, these changes are expected to grant the small servicer exemption to a larger number of firms. These entities should benefit from lower costs while their customers may lose some of the protections embedded in the relevant rules. The nature and magnitude of these protections and their potential costs are described in part VII of both of the 2013 Mortgage Servicing Final Rules.

The provisions that clarify and amend the definition of qualified mortgage should also add clarity to the rules and thus lower costs of compliance. These include the clarification of the test that they be eligible for purchase or guarantee by the GSEs or insured or guaranteed by the agencies, the clarification that a repurchase or indemnification demand by the GSEs, FHA, VA, USDA, or RHS is not determinative of qualified mortgage status, and the revisions clarifying that a loan meeting eligibility requirements provided in a written agreement with one of the GSEs, HUD, VA, USDA, or RHS is also eligible as are loans receiving individual waivers from GSEs or agencies.

These provisions make explicit that matters wholly unrelated to ability to repay will not be relevant to determination of QM status and that a creditor is not required to satisfy certain mandates concerning loan delivery and other requirements that are wholly unrelated to assessing a consumer's ability to repay the loan. They also clarify that loans meeting GSE or agency eligibility requirements set forth in an applicable written contract variance or individual waiver at the time of consummation are eligible for GSE or agency purchase, guarantee, or insurance under § 1026.43(e)(4). As such, these provisions should lower the burden for these loans to be qualified mortgages. The Bureau believes that these changes provide useful guidance to industry and generally conform the rules to the policies intended by the final rules issued in January. Accordingly, the discussion of benefits, costs, or impacts discussed in part VII of each of the January rules included consideration of the effects of each of these provisions.

The amendments to appendix Q in this final rule reduce the creditor's requirements to obtain affirmative confirmation that several types of income will continue in the future. Under these amendments, creditors may assume in the absence of contrary evidence, that certain past, current, and/or ongoing conditions can be reasonably expected to continue. Other provisions clarify the types of evidence that creditors may rely on to verify income, while another expands the types of rental income that may be used in the DTI calculation. The Bureau is also revising the introduction to appendix Q to clarify that creditors may look to guidance from certain federal agencies and the GSEs in applying appendix Q so long as that guidance is in accordance with the standards in appendix Q and to provide a default rule of excluding income and including debts and an optional safe harbor for reliance on GSE or Agency guidance when appendix Q's standards do not otherwise resolve how to treat a particular type of debt or income. As noted earlier, the Bureau believes that these provisions will establish clearer requirements for assessing the debt and income of consumers while at the same time facilitating creditor compliance. More specifically, these provisions should increase the probability that certain loans are originated as qualified mortgages and receive a presumption of compliance with the ability-to-repay standards. For such loans, the costs of origination may be slightly lower as a result of the slightly decreased liability for the lender and any assignees and for possibly decreased compliance costs. Consumers may benefit from slightly increased access to credit and lower costs on the affected loans; however, these consumers will also not have the added consumer protections that accompany loans made under the general ability-to-repay provisions. A more detailed discussion of these effects is contained in the discussion of benefits, costs, and impacts in part VII of the 2013 ATR Final Rule.

The final rule is generally not expected to have a differential impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 or on consumers in rural areas. The main exception is for those depository institutions and credit unions, which by virtue of their size, are more likely to qualify for the small servicer exemption and to benefit from the reduction in compliance burden.

Given the nature of the changes made by the final rule, the Bureau does not believe that the final rule will materially reduce consumers' access to consumer products and services. Rather, the reduced burden in many of the changes in this rule should generally help to improve access to credit.

VII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements.[60] These analyses must "describe the impact of the proposed rule on small entities." [61] An IRFA or FRFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities,[62] or if the agency considers a series of closely related rules as one rule for

[60] 5 U.S.C. 601 *et seq.*

[61] 5 U.S.C. 603(a). For purposes of assessing the impacts of the proposed rule on small entities, "small entities" is defined in the RFA to include small businesses, small nonprofit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A "small business" is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards. 5 U.S.C. 601(3). A "small organization" is any "not-for-profit enterprise which is independently owned and operated and is not dominant in its field." 5 U.S.C. 601(4). A "small governmental jurisdiction" is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[62] 5 U.S.C. 605(b).

purposes of complying with the IRFA or FRFA requirements.[63] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[64]

This rulemaking is part of a series of rules that have revised and expanded the regulatory requirements for entities that originate or service mortgage loans. In January 2013, the Bureau adopted the 2013 ATR Final Rule and the 2013 Mortgage Servicing Final Rules, along with other related rules mentioned above. Part VIII of the supplementary information to each of these rules set forth the Bureau's analyses and determinations under the RFA with respect to those rules. *See* 78 FR 10861 (Regulation X), 78 FR 10994 (Regulation Z—servicing), 78 FR 6575 (Regulation Z—ATR). Because this final rule generally makes clarifying changes to conform the January rules to their intended purposes, the RFA analyses associated with those rules generally take into account the impact of the changes made by this final rule.

Because these rules qualify as ''a series of closely related rules,'' for purposes of the RFA, the Bureau relies on those analyses and determines that it has met or exceeded the IRFA and FRFA requirements.

In the alternative, the Bureau also concludes that the final rule will not have a significant impact on a substantial number of small entities. As noted, this final rule generally clarifies the existing rules. These changes will not have a material impact on small entities. In the instance of the small servicer exemption, the rule likely reduces burden for the affected firms. In addition, the changes to appendix Q will likely reduce compliance costs by increasing clarity and providing more objective standards for evaluating certain kinds of income. The changes to appendix Q should also increase the probability that certain loans are originated as qualified mortgages and receive a presumption of compliance with the ability-to-repay standards. Therefore, the undersigned certifies that the rule will not have a significant impact on a substantial number of small entities.

VIII. Paperwork Reduction Act

This final rule amends 12 CFR 1026 (Regulation Z), which implements the Truth in Lending Act (TILA), and 12 CFR 1024 (Regulation X), which implements the Real Estate Settlement Procedures Act (RESPA). Regulations Z and X currently contain collections of information approved by OMB. The Bureau's OMB control number for Regulation Z is 3170–0015 and for Regulation X is 3170–0016. However, the Bureau has determined that this final rule will not materially alter these collections of information or impose any new recordkeeping, reporting, or disclosure requirements on the public that would constitute collections of information requiring approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects

12 CFR Part 1024

Condominiums, Consumer protection, Housing, Mortgage servicing, Mortgages, Recordkeeping requirements, Reporting.

12 CFR Part 1026

Advertising, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau amends Regulation X, 12 CFR part 1024, as amended by the final rule published on February 14, 2013, 78 FR 10695, and Regulation Z, 12 CFR part 1026, as amended by the final rules published on January 30, 2013, 78 FR 6407 and February 14, 2013, 78 FR 10901 as set forth below:

PART 1024—REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X)

■ 1. The authority citation for part 1024 continues to read as follows:

Authority: 12 U.S.C. 2603–2605, 2607, 2609, 2617, 5512, 5532, 5581.

Subpart A—General Provisions

■ 2. The subpart A heading is revised to read as set forth above.

■ 3. Section 1024.5 is amended by adding paragraph (c) to read as follows:

§ 1024.5 Coverage of RESPA.

* * * * *

(c) *Relation to State laws.* (1) State laws that are inconsistent with RESPA or this part are preempted to the extent of the inconsistency. However, RESPA and these regulations do not annul, alter, affect, or exempt any person subject to their provisions from complying with the laws of any State with respect to settlement practices, except to the extent of the inconsistency.

(2) Upon request by any person, the Bureau is authorized to determine if inconsistencies with State law exist; in doing so, the Bureau shall consult with appropriate Federal agencies.

(i) The Bureau may not determine that a State law or regulation is inconsistent with any provision of RESPA or this part, if the Bureau determines that such law or regulation gives greater protection to the consumer.

(ii) In determining whether provisions of State law or regulations concerning affiliated business arrangements are inconsistent with RESPA or this part, the Bureau may not construe those provisions that impose more stringent limitations on affiliated business arrangements as inconsistent with RESPA so long as they give more protection to consumers and/or competition.

(3) Any person may request the Bureau to determine whether an inconsistency exists by submitting to the address established by the Bureau to request an official interpretation, a copy of the State law in question, any other law or judicial or administrative opinion that implements, interprets or applies the relevant provision, and an explanation of the possible inconsistency. A determination by the Bureau that an inconsistency with State law exists will be made by publication of a notice in the **Federal Register**. ''Law'' as used in this section includes regulations and any enactment which has the force and effect of law and is issued by a State or any political subdivision of a State.

(4) A specific preemption of conflicting State laws regarding notices and disclosures of mortgage servicing transfers is set forth in § 1024.33(d).

Subpart B—Mortgage Settlement and Escrow Accounts

§ 1024.13 [Removed and Reserved]

■ 4. Section 1024.13 is removed and reserved.

■ 5. In Supplement I to Part 1024, Subpart A is added to read as follows:

Supplement I to Part 1024—Official Bureau Interpretations

* * * * *

Subpart A—General Provisions

§ 1024.5 Coverage of RESPA

5(c) Relation to State laws.

Paragraph 5(c)(1).

1. State laws that are inconsistent with the requirements of RESPA or

[63] 5 U.S.C. 605(c).

[64] 5 U.S.C. 609.

Regulation X may be preempted by RESPA or Regulation X. State laws that give greater protection to consumers are not inconsistent with and are not preempted by RESPA or Regulation X. In addition, nothing in RESPA or Regulation X should be construed to preempt the entire field of regulation of the practices covered by RESPA or Regulation X, including the regulations in Subpart C with respect to mortgage servicers or mortgage servicing.

* * * * *

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 6. The authority citation for part 1026 is revised to read as follows:

Authority: 12 U.S.C. 2601, 2603–2605, 2607, 2609, 2617, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart E—Special Rules for Certain Home Mortgage Transactions

■ 7. Section 1026.35 is amended by revising paragraph (e) introductory text, redesignating paragraph (e)(3) as paragraph (e)(4), and adding new paragraph (e)(3) to read as follows:

§ 1026.35 Requirements for higher-priced mortgage loans.

* * * * *

(e) *Repayment ability, prepayment penalties.* Except as provided in paragraph (e)(3) of this section, higher-priced mortgage loans are subject to the following restrictions:

* * * * *

(3) *Exclusions.* This paragraph (e) does not apply to a transaction to finance the initial construction of a dwelling; a temporary or ''bridge'' loan with a term of twelve months or less, such as a loan to purchase a new dwelling where the consumer plans to sell a current dwelling within twelve months; or a reverse mortgage transaction subject to § 1026.33.

* * * * *

■ 8. Section 1026.41 is amended by revising paragraphs (a)(1) and (e)(4)(ii) and (iii) to read as follows:

§ 1026.41 Periodic statements for residential mortgage loans.

(a) *In general.* (1) *Scope.* This section applies to a closed-end consumer credit transaction secured by a dwelling, unless an exemption in paragraph (e) of this section applies. A closed-end consumer credit transaction secured by a dwelling is referred to as a *mortgage loan* for purposes of this section.

* * * * *

(e) * * *

(4) * * *

(ii) *Small servicer defined.* A small servicer is a servicer that either:

(A) Services, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee; or

(B) Is a Housing Finance Agency, as defined in 24 CFR 266.5.

(iii) *Small servicer determination.* In determining whether a servicer is a small servicer, the servicer is evaluated based on the mortgage loans serviced by the servicer and any affiliates as of January 1 for the remainder of the calendar year. A servicer that ceases to qualify as a small servicer will have six months from the time it ceases to qualify or until the next January 1, whichever is later, to comply with any requirements from which the servicer is no longer exempt as a small servicer. The following mortgage loans are not considered in determining whether a servicer qualifies as a small servicer:

(A) Mortgage loans voluntarily serviced by the servicer for a creditor or assignee that is not an affiliate of the servicer and for which the servicer does not receive any compensation or fees.

(B) Reverse mortgage transactions.

(C) Mortgage loans secured by consumers' interests in timeshare plans.

■ 9. Section 1026.43 is amended by revising paragraphs (e)(4)(ii)(A) introductory text through (E) to read as follows:

§ 1026.43 Minimum standards for transactions secured by a dwelling.

* * * * *

(e) * * *

(4) * * *

(ii) * * *

(A) A loan that is eligible, except with regard to matters wholly unrelated to ability to repay:

* * * * *

(B) A loan that is eligible to be insured, except with regard to matters wholly unrelated to ability to repay, by the U.S. Department of Housing and Urban Development under the National Housing Act (12 U.S.C. 1707 *et seq.*);

(C) A loan that is eligible to be guaranteed, except with regard to matters wholly unrelated to ability to repay, by the U.S. Department of Veterans Affairs;

(D) A loan that is eligible to be guaranteed, except with regard to matters wholly unrelated to ability to repay, by the U.S. Department of Agriculture pursuant to 42 U.S.C. 1472(h); or

(E) A loan that is eligible to be insured, except with regard to matters wholly unrelated to ability to repay, by the Rural Housing Service.

* * * * *

■ 10. Appendix Q to Part 1026 is revised to read as follows:

Appendix Q to Part 1026—Standards for Determining Monthly Debt and Income

Section 1026.43(e)(2)(vi) provides that, to satisfy the requirements for a qualified mortgage under § 1026.43(e)(2), the ratio of the consumer's total monthly debt payments to total monthly income at the time of consummation cannot exceed 43 percent. Section 1026.43(e)(2)(vi)(A) requires the creditor to calculate the ratio of the consumer's total monthly debt payments to total monthly income using the following standards, with additional requirements for calculating debt and income appearing in § 1026.43(e)(2)(vi)(B). Where guidance issued by the U.S. Department of Housing and Urban Development, the U.S. Department of Veterans Affairs, the U.S. Department of Agriculture, or the Rural Housing Service, or issued by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) while operating under the conservatorship or receivership of the Federal Housing Finance Agency, or issued by a limited-life regulatory entity succeeding the charter of either Fannie Mae or Freddie Mac (collectively, Agency or GSE guidance) is in accordance with appendix Q, creditors may look to that guidance as a helpful resource in applying appendix Q. Moreover, when the following standards do not resolve how a specific kind of debt or income should be treated, the creditor may either (1) exclude the income or include the debt, or (2) rely on Agency or GSE guidance to resolve the issue. The following standards resolve the appropriate treatment of a specific kind of debt or income where the standards provide a discernible answer to the question of how to treat the debt or income. However, a creditor may not rely on Agency or GSE guidance to reach a resolution contrary to that provided by the following standards, even if such Agency or GSE guidance specifically addresses the particular type of debt or income but the following standards provide more generalized guidance.

I. Consumer Employment Related Income

A. Stability of Income

1. *Effective Income.* Income may not be used in calculating the consumer's debt-to-income ratio if it comes from any source that cannot be verified, is not stable, or will not continue.

2. *Verifying Employment History.*

a. The creditor must verify the consumer's employment for the most recent two full years, and the creditor must require the consumer to:

i. Explain any gaps in employment that span one or more months, and

ii. Indicate if he/she was in school or the military for the recent two full years, providing evidence supporting this claim, such as college transcripts, or discharge papers.

b. Allowances can be made for seasonal employment, typical for the building trades and agriculture, if documented by the creditor.

Note: A consumer with a 25 percent or greater ownership interest in a business is considered self-employed and will be evaluated as a self-employed consumer.

3. *Analyzing a Consumer's Employment Record.*

a. When analyzing a consumer's employment, creditors must examine:

i. The consumer's past employment record; and

ii. The employer's confirmation of current, ongoing employment status.

Note: Creditors may assume that employment is ongoing if a consumer's employer verifies current employment and does not indicate that employment has been, or is set to be terminated. Creditors should not rely upon a verification of current employment that includes an affirmative statement that the employment is likely to cease, such as a statement that indicates the employee has given (or been given) notice of employment suspension or termination.

b. Creditors may favorably consider the stability of a consumer's income if he/she changes jobs frequently within the same line of work, but continues to advance in income or benefits. In this analysis, income stability takes precedence over job stability.

4. *Consumers Returning to Work After an Extended Absence.* A consumer's income may be considered effective and stable when recently returning to work after an extended absence if he/she:

a. Is employed in the current job for six months or longer; and

b. Can document a two year work history prior to an absence from employment using:

i. Traditional employment verifications; and/or

ii. Copies of IRS Form W–2s or pay stubs.

Note: An acceptable employment situation includes individuals who took several years off from employment to raise children, then returned to the workforce.

c. Important: Situations not meeting the criteria listed above may not be used in qualifying. Extended absence is defined as six months.

B. Salary, Wage and Other Forms of Income

1. *General Policy on Consumer Income Analysis.*

a. The income of each consumer who will be obligated for the mortgage debt and whose income is being relied upon in determining ability to repay must be analyzed to determine whether his/her income level can be reasonably expected to continue.

b. In most cases, a consumer's income is limited to salaries or wages. Income from other sources can be considered as effective, when properly verified and documented by the creditor.

Notes: i. Effective income for consumers planning to retire during the first three-year period must include the amount of:

a. Documented retirement benefits;

b. Social Security payments; or

c. Other payments expected to be received in retirement.

ii. Creditors must not ask the consumer about possible, future maternity leave.

iii. Creditors may assume that salary or wage income from employment verified in accordance with section I.A.3 above can be reasonably expected to continue if a consumer's employer verifies current employment and income and does not indicate that employment has been, or is set to be terminated. Creditors should not assume that income can be reasonably expected to continue if a verification of current employment includes an affirmative statement that the employment is likely to cease, such as a statement that indicates the employee has given (or been given) notice of employment suspension or termination.

2. *Overtime and Bonus Income.*

a. Overtime and bonus income can be used to qualify the consumer if he/she has received this income for the past two years, and documentation submitted for the loan does not indicate this income will likely cease. If, for example, the employment verification states that the overtime and bonus income is unlikely to continue, it may not be used in qualifying.

b. The creditor must develop an average of bonus or overtime income for the past two years. Periods of overtime and bonus income less than two years may be acceptable, provided the creditor can justify and document in writing the reason for using the income for qualifying purposes.

3. *Establishing an Overtime and Bonus Income Earning Trend.*

a. The creditor must establish and document an earnings trend for overtime and bonus income. If either type of income shows a continual decline, the creditor must document in writing a sound rationalization for including the income when qualifying the consumer.

b. A period of more than two years must be used in calculating the average overtime and bonus income if the income varies significantly from year to year.

4. *Qualifying Part-Time Income.*

a. Part-time and seasonal income can be used to qualify the consumer if the creditor documents that the consumer has worked the part-time job uninterrupted for the past two years, and plans to continue. Many low and moderate income families rely on part-time and seasonal income for day to day needs, and creditors should not restrict consideration of such income when qualifying the income of these consumers.

b. Part-time income received for less than two years may be included as effective income, provided that the creditor justifies and documents that the income is likely to continue.

c. Part-time income not meeting the qualifying requirements may not be used in qualifying.

Note: For qualifying purposes, ''part-time'' income refers to employment taken to supplement the consumer's income from regular employment; part-time employment is not a primary job and it is worked less than 40 hours.

5. *Income from Seasonal Employment.*

a. Seasonal income is considered uninterrupted, and may be used to qualify the consumer, if the creditor documents that the consumer:

i. Has worked the same job for the past two years, and

ii. Expects to be rehired the next season.

b. Seasonal employment includes, but is not limited to:

i. Umpiring baseball games in the summer; or

ii. Working at a department store during the holiday shopping season.

6. *Primary Employment Less Than 40 Hour Work Week.*

a. When a consumer's primary employment is less than a typical 40-hour work week, the creditor should evaluate the stability of that income as regular, on-going primary employment.

b. Example: A registered nurse may have worked 24 hours per week for the last year. Although this job is less than the 40-hour work week, it is the consumer's primary employment, and should be considered effective income.

7. *Commission Income.*

a. Commission income must be averaged over the previous two years. To qualify commission income, the consumer must provide:

i. Copies of signed tax returns for the last two years; and

ii. The most recent pay stub.

b. Consumers whose commission income was received for more than one year, but less than two years may be considered favorably if the underwriter can:

i. Document the likelihood that the income will continue, and

ii. Soundly rationalize accepting the commission income.

Notes: i. Unreimbursed business expenses must be subtracted from gross income.

ii. A commissioned consumer is one who receives more than 25 percent of his/her annual income from commissions.

iii. A tax transcript obtained directly from the IRS may be used in lieu of signed tax returns.

8. *Qualifying Commission Income Earned for Less Than One Year.*

a. Commission income earned for less than one year is not considered effective income. Exceptions may be made for situations in which the consumer's compensation was changed from salary to commission within a similar position with the same employer.

b. A consumer's income may also qualify when the portion of earnings not attributed to commissions would be sufficient to qualify the consumer for the mortgage.

9. *Employer Differential Payments.*

If the employer subsidizes a consumer's mortgage payment through direct payments, the amount of the payments:

a. Is considered gross income, and

b. Cannot be used to offset the mortgage payment directly, even if the employer pays the servicing creditor directly.

10. *Retirement Income.*

Retirement income must be verified from the former employer, or from Federal tax returns. If any retirement income, such as employer pensions or 401(k)'s, will cease within the first full three years of the mortgage loan, such income may not be used in qualifying.

11. *Social Security Income.*

Social Security income must be verified by a Social Security Administration benefit verification letter (sometimes called a ''proof of income letter,'' ''budget letter,'' ''benefits letter,'' or ''proof of award letter''). If any benefits expire within the first full three years of the loan, the income source may not be used in qualifying.

Notes: i. If the Social Security Administration benefit verification letter does not indicate a defined expiration date within three years of loan origination, the creditor shall consider the income effective and likely to continue. Pending or current re-evaluation of medical eligibility for benefit payments is not considered an indication that the benefit payments are not likely to continue.

ii. Some portion of Social Security income may be ''grossed up'' if deemed nontaxable by the IRS.

12. *Automobile Allowances and Expense Account Payments.*

a. Only the amount by which the consumer's automobile allowance or expense account payments exceed actual expenditures may be considered income.

b. To establish the amount to add to gross income, the consumer must provide the following:

i. IRS Form 2106, Employee Business Expenses, for the previous two years; and

ii. Employer verification that the payments will continue.

c. If the consumer uses the standard per-mile rate in calculating automobile expenses, as opposed to the actual cost method, the portion that the IRS considers depreciation may be added back to income.

d. Expenses that must be treated as recurring debt include:

i. The consumer's monthly car payment; and

ii. Any loss resulting from the calculation of the difference between the actual expenditures and the expense account allowance.

C. Consumers Employed by a Family Owned Business.

1. *Income Documentation Requirement.*

In addition to normal employment verification, a consumer employed by a family owned business is required to provide evidence that he/she is not an owner of the business, which may include:

a. Copies of signed personal tax returns, or

b. A signed copy of the corporate tax return showing ownership percentage.

Note: A tax transcript obtained directly from the IRS may be used in lieu of signed tax returns.

D. General Information on Self-Employed Consumers and Income Analysis.

1. *Definition: Self-Employed Consumer.*

A consumer with a 25 percent or greater ownership interest in a business is considered self-employed.

2. *Types of Business Structures.*

There are four basic types of business structures. They include:

a. Sole proprietorships;

b. Corporations;

c. Limited liability or ''S'' corporations; and

d. Partnerships.

3. *Minimum Length of Self Employment.*

a. Income from self-employment is considered stable, and effective, if the consumer has been self-employed for two or more years.

b. Due to the high probability of failure during the first few years of a business, the requirements described in the table below are necessary for consumers who have been self-employed for less than two years.

If the period of self-employment is:	Then:
Between one and two years	For the individual's income to be effective, the individual must have at least two years of documented previous successful employment in the line of work in which the individual is self-employed, or in a related occupation. Note: A combination of one year of employment and formal education or training in the line of work the individual is self-employed or in a related occupation is also acceptable.
Less than one year	The income from the consumer may not be considered effective income.

4. *General Documentation Requirements for Self-Employed Consumers.*

Self-employed consumers must provide the following documentation:

a. Signed, dated individual tax returns, with all applicable tax schedules for the most recent two years;

b. For a corporation, ''S'' corporation, or partnership, signed copies of Federal business income tax returns for the last two years, with all applicable tax schedules; and

c. Year to date profit and loss (P&L) statement and balance sheet.

5. *Establishing a Self-Employed Consumer's Earnings Trend.*

a. When qualifying income, the creditor must establish the consumer's earnings trend from the previous two years using the consumer's tax returns.

b. If a consumer:

i. Provides quarterly tax returns, the income analysis may include income through the period covered by the tax filings, or

ii. Is not subject to quarterly tax returns, or does not file them, then the income shown on the P&L statement may be included in the analysis, provided the income stream based on the P&L is consistent with the previous years' earnings.

c. If the P&L statements submitted for the current year show an income stream considerably greater than what is supported by the previous year's tax returns, the creditor must base the income analysis solely on the income verified through the tax returns.

d. If the consumer's earnings trend for the previous two years is downward and the most recent tax return or P&L is less than the prior year's tax return, the consumer's most recent year's tax return or P&L must be used to calculate his/her income.

6. *Analyzing the Business's Financial Strength.*

The creditor must consider the business's financial strength by examining annual earnings. Annual earnings that are stable or increasing are acceptable, while businesses that show a significant decline in income over the analysis period are not acceptable.

E. Income Analysis: Individual Tax Returns (IRS Form 1040).

1. *General Policy on Adjusting Income Based on a Review of IRS Form 1040.*

The amount shown on a consumer's IRS Form 1040 as adjusted gross income must either be increased or decreased based on the creditor's analysis of the individual tax return and any related tax schedules.

2. *Guidelines for Analyzing IRS Form 1040.*

The table below contains guidelines for analyzing IRS Form 1040:

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IRS Form 1040 heading	Description
Wages, Salaries and Tips	An amount shown under this heading may indicate that the individual: • Is a salaried employee of a corporation, or • Has other sources of income. This section may also indicate that the spouse is employed, in which case the spouse's income must be subtracted from the consumer's adjusted gross income.
Business Income and Loss (from Schedule C)	Sole proprietorship income calculated on Schedule C is business income. Depreciation or depletion may be added back to the adjusted gross income.
Rents, Royalties, Partnerships (from Schedule E)	Any income received from rental properties or royalties may be used as income, after adding back any depreciation shown on Schedule E.
Capital Gain and Losses (from Schedule D)	Capital gains or losses generally occur only one time, and should not be considered when determining effective income. However, if the individual has a constant turnover of assets resulting in gains or losses, the capital gain or loss must be considered when determining the income. Three years' tax returns are required to evaluate an earning trend. If the trend: • Results in a gain, it may be added as effective income, or • Consistently shows a loss, it must be deducted from the total income. Creditor must document anticipated continuation of income through verified assets. *Example:* A creditor can consider the capital gains for an individual who purchases old houses, remodels them, and sells them for profit.
Interest and Dividend Income (from Schedule B)	This taxable/tax-exempt income may be added back to the adjusted gross income only if it: • Has been received for the past two years; and • Is expected to continue. If the interest-bearing asset will be liquidated as a source of the cash investment, the creditor must appropriately adjust the amount.
Farm Income or Loss (from Schedule F)	Any depreciation shown on Schedule F may be added back to the adjusted gross income.
IRA Distributions, Pensions, Annuities, and Social Security Benefits	The non-taxable portion of these items may be added back to the adjusted gross income, if the income is expected to continue for the first three years of the mortgage.
Adjustments to Income	Adjustments to income may be added back to the adjusted gross income if they are: • IRA and Keogh retirement deductions; • Penalties on early withdrawal of savings; • Health insurance deductions; and • Alimony payments.
Employee Business Expenses	Employee business expenses are actual cash expenses that must be deducted from the adjusted gross income.

F. Income Analysis: Corporate Tax Returns (IRS Form 1120).

1. *Description: Corporation.*

A corporation is a State-chartered business owned by its stockholders.

2. *Need To Obtain Consumer Percentage of Ownership Information.*

a. Corporate compensation to the officers, generally in proportion to the percentage of ownership, is shown on the:

i. Corporate tax return IRS Form 1120; and

ii. Individual tax returns.

b. When a consumer's percentage of ownership does not appear on the tax returns, the creditor must obtain the information from the corporation's accountant, along with evidence that the consumer has the right to any compensation.

3. *Analyzing Corporate Tax Returns.*

a. In order to determine a consumer's self-employed income from a corporation the adjusted business income must:

i. Be determined; and

ii. Multiplied by the consumer's percentage of ownership in the business.

b. The table below describes the items found on IRS Form 1120 for which an adjustment must be made in order to determine adjusted business income.

Adjustment item	Description of adjustment
Depreciation and Depletion	Add the corporation's depreciation and depletion back to the after-tax income.
Taxable Income	Taxable income is the corporation's net income before Federal taxes. Reduce taxable income by the tax liability.
Fiscal Year vs. Calendar Year	If the corporation operates on a fiscal year that is different from the calendar year, an adjustment must be made to relate corporate income to the individual tax return.
Cash Withdrawals	The consumer's withdrawal of cash from the corporation may have a severe negative impact on the corporation's ability to continue operating.

G. Income Analysis: "S" Corporation Tax Returns (IRS Form 1120S).

1. *Description: "S" Corporation.*

a. An "S" corporation is generally a small, start-up business, with gains and losses passed to stockholders in proportion to each stockholder's percentage of business ownership.

b. Income for owners of "S" corporations comes from IRS Form W–2 wages, and is taxed at the individual rate. The IRS Form 1120S, Compensation of Officers line item is transferred to the consumer's individual IRS Form 1040.

2. *Analyzing "S" Corporation Tax Returns.*

a. "S" corporation depreciation and depletion may be added back to income in proportion to the consumer's share of the corporation's income.

b. In addition, the income must also be reduced proportionately by the total obligations payable by the corporation in less than one year.

c. Important: The consumer's withdrawal of cash from the corporation may have a severe negative impact on the corporation's ability to continue operating, and must be considered in the income analysis.

H. Income Analysis: Partnership Tax Returns (IRS Form 1065).

1. *Description: Partnership.*

a. A partnership is formed when two or more individuals form a business, and share in profits, losses, and responsibility for running the company.

b. Each partner pays taxes on his/her proportionate share of the partnership's net income.

2. *Analyzing Partnership Tax Returns.*

a. Both general and limited partnerships report income on IRS Form 1065, and the partners' share of income is carried over to Schedule E of IRS Form 1040.

b. The creditor must review IRS Form 1065 to assess the viability of the business. Both depreciation and depletion may be added back to the income in proportion to the consumer's share of income.

c. Income must also be reduced proportionately by the total obligations payable by the partnership in less than one year.

d. Important: Cash withdrawals from the partnership may have a severe negative impact on the partnership's ability to continue operating, and must be considered in the income analysis.

II. Non-Employment Related Consumer Income

A. Alimony, Child Support, and Maintenance Income Criteria.

Alimony, child support, or maintenance income may be considered effective, if:

1. Payments are likely to be received consistently for the first three years of the mortgage;

2. The consumer provides the required documentation, which includes a copy of the:

i. Final divorce decree;

ii. Legal separation agreement;

iii. Court order; or

iv. Voluntary payment agreement; and

3. The consumer can provide acceptable evidence that payments have been received during the last 12 months, such as:

i. Cancelled checks;

ii. Deposit slips;

iii. Tax returns; or

iv. Court records.

Notes: i. Periods less than 12 months may be acceptable, provided the creditor can adequately document the payer's ability and willingness to make timely payments.

ii. Child support may be "grossed up" under the same provisions as non-taxable income sources.

B. Investment and Trust Income.

1. *Analyzing Interest and Dividends.*

a. Interest and dividend income may be used as long as tax returns or account statements support a two-year receipt history. This income must be averaged over the two years.

b. Subtract any funds that are derived from these sources, and are required for the cash investment, before calculating the projected interest or dividend income.

2. *Trust Income.*

a. Income from trusts may be used if constant payments will continue for at least the first three years of the mortgage term as evidenced by trust income documentation.

b. Required trust income documentation includes a copy of the Trust Agreement or other trustee statement, confirming the:

i. Amount of the trust;

ii. Frequency of distribution; and

iii. Duration of payments.

c. Trust account funds may be used for the required cash investment if the consumer provides adequate documentation that the withdrawal of funds will not negatively affect income. The consumer may use funds from the trust account for the required cash investment, but the trust income used to determine repayment ability cannot be affected negatively by its use.

3. *Notes Receivable Income.*

a. In order to include notes receivable income, the consumer must provide:

i. A copy of the note to establish the amount and length of payment, and

ii. Evidence that these payments have been consistently received for the last 12 months through deposit slips, deposit receipts, cancelled checks, bank or other account statements, or tax returns.

b. If the consumer is not the original payee on the note, the creditor must establish that the consumer is able to enforce the note.

4. *Eligible Investment Properties.*

Follow the steps in the table below to calculate an investment property's income or loss if the property to be subject to a mortgage is an eligible investment property.

1	Subtract the monthly payment (PITI) from the monthly net rental income of the subject property. Note: Calculate the monthly net rental by taking the gross rents, and subtracting the 25 percent reduction for vacancies and repairs.
2	Does the calculation in Step 1 yield a positive number? • If *yes*, add the number to the consumer's monthly gross income. • If *no*, and the calculation yields a negative number, consider it a recurring monthly obligation.

C. Military, Government Agency, and Assistance Program Income.

1. *Military Income.*

a. Military personnel not only receive base pay, but often times are entitled to additional forms of pay, such as:

i. Income from variable housing allowances;

ii. Clothing allowances;

iii. Flight or hazard pay;

iv. Rations; and

v. Proficiency pay.

b. These types of additional pay are acceptable when analyzing a consumer's income as long as the probability of such pay to continue is verified in writing.

Note: The tax-exempt nature of some of the above payments should also be considered.

2. *VA Benefits.*

a. Direct compensation for service-related disabilities from the Department of Veterans Affairs (VA) is acceptable, provided the creditor receives documentation from the VA.

b. Education benefits used to offset education expenses are not acceptable.

3. *Government Assistance Programs.*

a. Income received from government assistance programs is acceptable as long as the paying agency provides documentation indicating that the income is expected to continue for at least three years.

b. If the income from government assistance programs will not be received for at least three years, it may not be used in qualifying.

c. Unemployment income must be documented for two years, and there must be reasonable assurance that this income will continue. This requirement may apply to seasonal employment.

Note: Social Security income is acceptable as provided in section I.B.11.

4. *Mortgage Credit Certificates.*

a. If a government entity subsidizes the mortgage payments either through direct payments or tax rebates, these payments may be considered as acceptable income.

b. Either type of subsidy may be added to gross income, or used directly to offset the mortgage payment, before calculating the qualifying ratios.

5. *Homeownership Subsidies.*

a. A monthly subsidy may be treated as income, if a consumer is receiving subsidies under the housing choice voucher home ownership option from a public housing agency (PHA). Although continuation of the homeownership voucher subsidy beyond the first year is subject to Congressional appropriation, for the purposes of underwriting, the subsidy will be assumed to continue for at least three years.

b. If the consumer is receiving the subsidy directly, the amount received is treated as income. The amount received may also be treated as nontaxable income and be ''grossed up'' by 25 percent, which means that the amount of the subsidy, plus 25 percent of that subsidy may be added to the consumer's income from employment and/or other sources.

c. Creditors may treat this subsidy as an ''offset'' to the monthly mortgage payment (that is, reduce the monthly mortgage payment by the amount of the home ownership assistance payment before dividing by the monthly income to determine the payment-to-income and debt-to-income ratios). The subsidy payment must not pass through the consumer's hands.

d. The assistance payment must be:

i. Paid directly to the servicing creditor; or

ii. Placed in an account that only the servicing creditor may access.

Note: Assistance payments made directly to the consumer must be treated as income.

D. Rental Income.

1. *Analyzing the Stability of Rental Income.*

a. Rent received for properties owned by the consumer is acceptable as long as the creditor can document the stability of the rental income through:

i. A current lease;

ii. An agreement to lease; or

iii. A rental history over the previous 24 months that is free of unexplained gaps greater than three months (such gaps could be explained by student, seasonal, or military renters, or property rehabilitation).

b. A separate schedule of real estate is not required for rental properties as long as all properties are documented on the Uniform Residential Loan Application.

Note: The underwriting analysis may not consider rental income from any property being vacated by the consumer, except under the circumstances described below.

2. *Rental Income From Consumer Occupied Property.*

a. The rent for multiple unit property where the consumer resides in one or more units and charges rent to tenants of other units may be used for qualifying purposes.

b. Projected rent for the tenant-occupied units only may:

i. Be considered gross income, only after deducting vacancy and maintenance factors, and

ii. Not be used as a direct offset to the mortgage payment.

3. *Income from Roommates or Boarders in a Single Family Property.*

a. Rental income from roommates or boarders in a single family property occupied as the consumer's primary residence is acceptable.

b. The rental income may be considered effective if shown on the consumer's tax return. If not on the tax return, rental income paid by the roommate or boarder may not be used in qualifying.

4. *Documentation Required To Verify Rental Income.*

Analysis of the following required documentation is necessary to verify all consumer rental income:

a. IRS Form 1040 Schedule E; and

b. Current leases/rental agreements.

5. *Analyzing IRS Form 1040 Schedule E.*

a. The IRS Form 1040 Schedule E is required to verify all rental income. Depreciation shown on Schedule E may be added back to the net income or loss.

b. Positive rental income is considered gross income for qualifying purposes, while negative income must be treated as a recurring liability.

c. The creditor must confirm that the consumer still owns each property listed, by comparing Schedule E with the real estate owned section of the Uniform Residential Loan Application (URLA).

6. *Using Current Leases To Analyze Rental Income.*

a. The consumer can provide a current signed lease or other rental agreement for a property that was acquired since the last income tax filing, and is not shown on Schedule E.

b. In order to calculate the rental income:

i. Reduce the gross rental amount by 25 percent for vacancies and maintenance;

ii. Subtract PITI and any homeowners association dues; and

iii. Apply the resulting amount to income, if positive, or recurring debts, if negative.

7. *Exclusion of Rental Income From Property Being Vacated by the Consumer.* Underwriters may not consider any rental income from a consumer's principal residence that is being vacated in favor of

another principal residence, except under the conditions described below:

Notes: i. This policy assures that a consumer either has sufficient income to make both mortgage payments without any rental income, or has an equity position not likely to result in defaulting on the mortgage on the property being vacated.

ii. This applies solely to a principal residence being vacated in favor of another principal residence. It does not apply to existing rental properties disclosed on the loan application and confirmed by tax returns (Schedule E of form IRS 1040).

8. *Policy Exceptions Regarding the Exclusion of Rental Income From a Principal Residence Being Vacated by a Consumer.*

When a consumer vacates a principal residence in favor of another principal residence, the rental income, reduced by the appropriate vacancy factor, may be considered in the underwriting analysis under the circumstances listed in the table below.

Exception	Description
Relocations	The consumer is relocating with a new employer, or being transferred by the current employer to an area not within reasonable and locally-recognized commuting distance. A properly executed lease agreement (that is, a lease signed by the consumer and the lessee) of at least one year's duration after the loan is closed is required. Note: Underwriters should also obtain evidence of the security deposit and/or evidence the first month's rent was paid to the homeowner.
Sufficient Equity in Vacated Property	The consumer has a loan-to-value ratio of 75 percent or less, as determined either by: • A current (no more than six months old) residential appraisal, or • Comparing the unpaid principal balance to the original sales price of the property. Note: The appraisal, in addition to using forms Fannie Mae1004/Freddie Mac 70, may be an exterior-only appraisal using form Fannie Mae/Freddie Mac 2055, and for condominium units, form Fannie Mae 1075/Freddie Mac 466.

E. Non-Taxable and Projected Income

1. *Types of Non-Taxable Income.*

Certain types of regular income may not be subject to Federal tax. Such types of non-taxable income include:

a. Some portion of Social Security, some Federal government employee retirement income, Railroad Retirement Benefits, and some State government retirement income;

b. Certain types of disability and public assistance payments;

c. Child support;

d. Military allowances; and

e. Other income that is documented as being exempt from Federal income taxes.

2. *Adding Non-Taxable Income to a Consumer's Gross Income.*

a. The amount of continuing tax savings attributed to regular income not subject to Federal taxes may be added to the consumer's gross income.

b. The percentage of non-taxable income that may be added cannot exceed the appropriate tax rate for the income amount. Additional allowances for dependents are not acceptable.

c. The creditor:

i. Must document and support the amount of income grossed up for any non-taxable income source, and

ii. Should use the tax rate used to calculate the consumer's last year's income tax.

Note: If the consumer is not required to file a Federal tax return, the tax rate to use is 25 percent.

3. *Analyzing Projected Income.*

a. Projected or hypothetical income is not acceptable for qualifying purposes. However, exceptions are permitted for income from the following sources:

i. Cost-of-living adjustments;

ii. Performance raises; and

iii. Bonuses.

b. For the above exceptions to apply, the income must be:

i. Verified in writing by the employer; and

ii. Scheduled to begin within 60 days of loan closing.

4. *Projected Income for New Job.*

a. Projected income is acceptable for qualifying purposes for a consumer scheduled to start a new job within 60 days of loan closing if there is a guaranteed, non-revocable contract for employment.

b. The creditor must verify that the consumer will have sufficient income or cash reserves to support the mortgage payment and any other obligations between loan closing and the start of employment. Examples of this type of scenario are teachers whose contracts begin with the new school year, or physicians beginning a residency after the loan closes.

c. The income does not qualify if the loan closes more than 60 days before the consumer starts the new job.

III. Consumer Liabilities: Recurring Obligations

1. *Types of Recurring Obligation.* Recurring obligations include:

a. All installment loans;

b. Revolving charge accounts;

c. Real estate loans;

d. Alimony;

e. Child support; and

f. Other continuing obligations.

2. *Debt to Income Ratio Computation for Recurring Obligations.*

a. The creditor must include the following when computing the debt to income ratios for recurring obligations:

i. Monthly housing expense; and

ii. Additional recurring charges extending ten months or more, such as

a. Payments on installment accounts;

b. Child support or separate maintenance payments;

c. Revolving accounts; and

d. Alimony.

b. Debts lasting less than ten months must be included if the amount of the debt affects the consumer's ability to pay the mortgage during the months immediately after loan closing, especially if the consumer will have limited or no cash assets after loan closing.

Note: Monthly payments on revolving or open-ended accounts, regardless of the balance, are counted as a liability for qualifying purposes even if the account appears likely to be paid off within 10 months or less.

3. *Revolving Account Monthly Payment Calculation.* If the credit report shows any revolving accounts with an outstanding balance but no specific minimum monthly payment, the payment must be calculated as the greater of:

a. 5 percent of the balance; or

b. $10.

Note: If the actual monthly payment is documented from the creditor or the creditor obtains a copy of the current statement reflecting the monthly payment, that amount may be used for qualifying purposes.

4. *Reduction of Alimony Payment for Qualifying Ratio Calculation.* Since there are tax consequences of alimony payments, the creditor may choose to treat the monthly alimony obligation as a reduction from the consumer's gross income when calculating the ratio, rather than treating it as a monthly obligation.

IV. Consumer Liabilities: Contingent Liability

1. *Definition: Contingent Liability.* A contingent liability exists when an individual is held responsible for payment of a debt if another party, jointly or severally obligated, defaults on the payment.

2. *Application of Contingent Liability Policies.* The contingent liability policies described in this topic apply unless the consumer can provide conclusive evidence from the debt holder that there is no possibility that the debt holder will pursue debt collection against him/her should the other party default.

3. *Contingent Liability on Mortgage Assumptions.* Contingent liability must be considered when the consumer remains obligated on an outstanding FHA-insured, VA-guaranteed, or conventional mortgage secured by property that:

a. Has been sold or traded within the last 12 months without a release of liability, or

b. Is to be sold on assumption without a release of liability being obtained.

4. *Exemption From Contingent Liability Policy on Mortgage Assumptions.* When a mortgage is assumed, contingent liabilities need not be considered if the:

a. Originating creditor of the mortgage being underwritten obtains, from the servicer of the assumed loan, a payment history showing that the mortgage has been current during the previous 12 months, or

b. Value of the property, as established by an appraisal or the sales price on the HUD–1 Settlement Statement from the sale of the property, results in a loan-to-value (LTV) ratio of 75 percent or less.

5. *Contingent Liability on Cosigned Obligations.*

a. Contingent liability applies, and the debt must be included in the underwriting analysis, if an individual applying for a mortgage is a cosigner/co-obligor on:

i. A car loan;

ii. A student loan;

iii. A mortgage; or

iv. Any other obligation.

b. If the creditor obtains documented proof that the primary obligor has been making regular payments during the previous 12 months, and does not have a history of delinquent payments on the loan during that time, the payment does not have to be included in the consumer's monthly obligations.

V. Consumer Liabilities: Projected Obligations and Obligations Not Considered Debt

1. Projected Obligations

a. Debt payments, such as a student loan or balloon-payment note scheduled to begin or come due within 12 months of the mortgage loan closing, must be included by the creditor as anticipated monthly obligations during the underwriting analysis.

b. Debt payments do not have to be classified as projected obligations if the consumer provides written evidence that the debt will be deferred to a period outside the 12-month timeframe.

c. Balloon-payment notes that come due within one year of loan closing must be considered in the underwriting analysis.

2. Obligations Not Considered Debt

Obligations not considered debt, and therefore not subtracted from gross income, include:

a. Federal, State, and local taxes;

b. Federal Insurance Contributions Act (FICA) or other retirement contributions, such as 401(k) accounts (including repayment of debt secured by these funds):

c. Commuting costs;

d. Union dues;

e. Open accounts with zero balances;

f. Automatic deductions to savings accounts;

g. Child care; and

h. Voluntary deductions.

11. In Supplement I to Part 1026—Official Interpretations:

A. Under *Section 1026.41—Periodic Statements for Residential Mortgage Loans:*

i. Under *41(e)(4) Small servicers:*

a. Under *41(e)(4)(ii) Small servicer defined,* paragraphs 1 and 2 are revised and paragraph 3 is added.

b. Under *Paragraph 41(e)(4)(iii) Small servicer determination,* paragraph 3 is added.

B. Under *Section 1026.43—Minimum Standards for Transactions Secured by a Dwelling:*

i. Under *43(e)(4) Qualified mortgage defined-special rules,* paragraph 4 is revised and paragraph 5 is added.

The revisions and additions read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

* * * * *

§ 1026.41 Periodic Statements for Residential Mortgage Loans

* * * * *

41(e)(4)(ii) Small servicer defined.

1. *Mortgage loans considered.* Pursuant to § 1026.41(a)(1), the mortgage loans considered in determining status as a small servicer are closed-end consumer credit transactions secured by a dwelling, subject to the exclusions in § 1026.41(e)(4)(iii).

2. *Requirements to be a small servicer.* Pursuant to § 1026.41(e)(4)(ii)(A), to qualify as a small servicer, a servicer must service, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee. There are two elements to this requirement. First, a servicer, together with any affiliates, must service 5,000 or fewer mortgage loans. Second, a servicer must service only mortgage loans for which the servicer (or an affiliate) is the creditor or assignee. To be the creditor or assignee of a mortgage loan, the servicer (or an affiliate) must either currently own the mortgage loan or must have been the entity to which the mortgage loan obligation was initially payable (that is, the originator of the mortgage loan). A servicer is not a small servicer if it services any mortgage loans for which the servicer or an affiliate is not the creditor or assignee (that is, for which the servicer or an affiliate is not the owner or was not the originator). The following two examples demonstrate circumstances in which a servicer would not qualify as a small servicer because it did not meet both requirements for determining a servicer's status as a small servicer:

i. A servicer services 3,000 mortgage loans, all of which it or an affiliate owns or originated. An affiliate of the servicer services 4,000 other mortgage loans, all of which it or an affiliate owns or originated. Because the number of mortgage loans serviced by a servicer is determined by counting the mortgage loans serviced by a servicer together with any affiliates, both of these servicers are considered to be servicing 7,000 mortgage loans and neither servicer is a small servicer.

ii. A service services 3,100 mortgage loans—3,000 mortgage loans it owns or originated and 100 mortgage loans it neither owns nor originated, but for which it owns the mortgage servicing rights. The servicer is not a small servicer because it services mortgage loans for which the servicer (or an affiliate) is not the creditor or assignee, notwithstanding that the servicer services fewer than 5,000 mortgage loans.

3. *Master servicing and subservicing.* A servicer that qualifies as a small servicer does not lose its small servicer status if it retains a subservicer, as that term is defined in 12 CFR 1024.31, to service any of its mortgage loans. A subservicer can gain the benefit of the small servicer exemption only if (1) the master servicer, as that term is defined in 12 CFR 1024.31, is a small servicer and (2) the subservicer is a small servicer. A subservicer generally will not qualify as a small servicer because it does not own or did not originate the mortgage loans it subservices—unless it is an affiliate of a master servicer that qualifies as a small servicer. The following examples demonstrate the application of the small servicer exemption for different forms of servicing relationships:

i. A credit union services 4,000 mortgage loans, all of which it originated or owns. The credit union retains a credit union service organization, that is not an affiliate, to subservice 1,000 of the mortgage loans. The credit union is a small servicer and, thus, can gain the benefit of the small servicer exemption for the 3,000 mortgage loans the credit union services itself. The credit union service organization is not a small servicer because it services mortgage loans it does not own or did not originate. Accordingly, the credit union service organization does not gain the benefit of the small servicer exemption and, thus, must comply with any applicable mortgage servicing requirements for the 1,000 mortgage loans it subservices.

ii. A bank holding company, through a lender subsidiary, owns or originated 4,000 mortgage loans. All mortgage servicing rights for the 4,000 mortgage loans are owned by a wholly owned master servicer subsidiary. Servicing for the 4,000 mortgage loans is conducted by a wholly owned subservicer subsidiary. The bank holding company controls all of these subsidiaries and, thus, they are affiliates of the bank holding company pursuant 12 CFR 1026.32(b)(2). Because the master servicer and subservicer service 5,000 or fewer mortgage loans, and because all the mortgage loans are owned or originated by an affiliate, the master servicer and the subservicer both qualify for the small servicer exemption for all 4,000 mortgage loans.

iii. A nonbank servicer services 4,000 mortgage loans, all of which it originated or owns. The servicer retains a ‘‘component servicer’’ to assist it with servicing functions. The component servicer is not engaged in ‘‘servicing’’ as defined in 12 CFR 1024.2; that is, the component servicer does not receive any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts, and does not make the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. The component servicer is not a subservicer pursuant to 12 CFR 1024.31 because it is not engaged in servicing, as that term is defined in 12 CFR 1024.2. The nonbank servicer is a small servicer and, thus, can gain the benefit of the small servicer exemption with regard to all 4,000 mortgage loans it services.

41(e)(4)(iii) Small servicer determination.

* * * * *

2. Timing for small servicer exemption. The following examples demonstrate when a servicer either is considered or is no longer considered a small servicer:

i. A servicer that begins servicing more than 5,000 mortgage loans (or begins servicing one or more mortgage loans it does not own or did not originate) on October 1, and services more than 5,000 mortgage loans (or services one or more mortgage loans it does not own or did not originate) as of January 1 of the following year, would no longer be considered a small servicer on January 1 of that following year and would have to comply with any requirements from which it is no longer exempt as a small servicer on April 1 of that following year.

ii. A servicer that begins servicing more than 5,000 mortgage loans (or begins servicing one or more mortgage loans it does not own or did not originate) on February 1, and services more than 5,000 mortgage loans (or services one or more mortgage loans it does not own or did not originate) as of January 1 of the following year, would no longer be considered a small servicer on January 1 of that following year and would have to comply with any requirements from which it is no longer exempt as a small servicer on that same January 1.

iii. A servicer that begins servicing more than 5,000 mortgage loans (or begins servicing one or more mortgage loans it does not own or did not originate) on February 1, but services less than 5,000 mortgage loans (or no longer services mortgage loans it does not own or did not originate) as of January 1 of the following year, is considered a small servicer for that following year.

* * * * *

3. *Mortgage loans not considered in determining whether a servicer is a small servicer.* Mortgage loans that are not considered for purposes of determining whether a servicer is a small servicer pursuant to § 1026.41(e)(4)(iii) are not considered either for determining whether a servicer, together with any affiliates, services 5,000 or fewer mortgage loans or whether a servicer is servicing only mortgage loans that it owns or originated. For example, assume a servicer services 5,400 mortgage loans. Of these mortgage loans, the servicer owns or originated 4,800 mortgage loans, voluntarily services 300 mortgage loans that it does not own or did not originate for an unaffiliated nonprofit organization for which the servicer does not receive any compensation or fees, and services 300 reverse mortgage transactions that it does not own and did not originate. Because the only mortgage loans considered are the 4,800 mortgage loans owned or originated by the servicer, the servicer is considered a small servicer and qualifies for the small servicer exemption with regard to all 5,400 mortgage loans it services. Note that reverse mortgages and mortgage loans secured by consumers' interests in timeshare plans, in addition to not being considered in determining small servicer qualification, are also exempt from the requirements of § 1026.41. In contrast, although charitably serviced mortgage loans, as defined by § 1026.41(e)(4)(iii), are likewise not considered in determining small servicer qualification, they are not exempt from the requirements of § 1026.41. Thus, a servicer that does *not* qualify as a small servicer would not have to provide periodic statements for reverse mortgages and timeshare plans because they are exempt from the rule, but would have to provide periodic statements for mortgage loans it charitably services.

* * * * *

§ 1026.43 Minimum Standards for Transactions Secured by a Dwelling

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43(e)(4) Qualified mortgage defined—special rules.

* * * * *

4. *Eligible for purchase, guarantee, or insurance except with regard to matters wholly unrelated to ability to repay.* To satisfy § 1026.43(e)(4)(ii), a loan need not be actually purchased or guaranteed by Fannie Mae or Freddie Mac or insured or guaranteed by one of the

Agencies (the U.S. Department of Housing and Urban Development (HUD), U.S. Department of Veterans Affairs (VA), U.S. Department of Agriculture (USDA), or Rural Housing Service (RHS)). Rather, § 1026.43(e)(4)(ii) requires only that the creditor determine that the loan is eligible (*i.e.,* meets the criteria) for such purchase, guarantee, or insurance at consummation. For example, for purposes of § 1026.43(e)(4), a creditor is not required to sell a loan to Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either) for that loan to be a qualified mortgage; however, the loan must be eligible for purchase or guarantee by Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either), including satisfying any requirements regarding consideration and verification of a consumer's income or assets, credit history, debt-to-income ratio or residual income, and other credit risk factors, but not any requirements regarding matters wholly unrelated to ability to repay. To determine eligibility for purchase, guarantee or insurance, a creditor may rely on a valid underwriting recommendation provided by a GSE automated underwriting system (AUS) or an AUS that relies on an Agency underwriting tool; compliance with the standards in the GSE or Agency written guide in effect at the time; a written agreement between the creditor or a direct sponsor or aggregator of the creditor and a GSE or Agency that permits variation from the standards of the written guides and/or variation from the AUSs, in effect at the time of consummation; or an individual loan waiver granted by the GSE or Agency to the creditor. For creditors relying on the variances of a sponsor or aggregator, a loan that is transferred directly to or through the sponsor or aggregator at or after consummation complies with § 1026.43(e)(4). In using any of the four methods listed above, the creditor need not satisfy standards that are wholly unrelated to assessing a consumer's ability to repay that the creditor is required to perform. Matters wholly unrelated to ability to repay are those matters that are wholly unrelated to credit risk or the underwriting of the loan. Such matters include requirements related to the status of the creditor rather than the loan, requirements related to selling, securitizing, or delivering the loan, and any requirement that the creditor must perform after the consummated loan is sold, guaranteed, or endorsed for insurance such as document custody, quality control, or servicing.

Accordingly, a covered transaction is eligible for purchase or guarantee by Fannie Mae or Freddie Mac, for example, if:

i. The loan conforms to the relevant standards set forth in the Fannie Mae Single-Family Selling Guide or the Freddie Mac Single-Family Seller/Servicer Guide in effect at the time, or to standards set forth in a written agreement between the creditor or a sponsor or aggregator of the creditor and Fannie Mae or Freddie Mac in effect at that time that permits variation from the standards of those guides;

ii. The loan has been granted an individual waiver by a GSE, which will allow purchase or guarantee in spite of variations from the applicable standards; or

iii. The creditor inputs accurate information into the Fannie Mae or Freddie Mac AUS or another AUS pursuant to a written agreement between the creditor and Fannie Mae or Freddie Mac that permits variation from the GSE AUS; the loan receives one of the recommendations specified below in paragraphs A or B from the corresponding GSE AUS or an equivalent recommendation pursuant to another AUS as authorized in the written agreement; and the creditor satisfies any requirements and conditions specified by the relevant AUS that are not wholly unrelated to ability to repay, the non-satisfaction of which would invalidate that recommendation:

A. An ''Approve/Eligible'' recommendation from Desktop Underwriter (DU); or

B. A risk class of ''Accept'' and purchase eligibility of ''Freddie Mac Eligible'' from Loan Prospector (LP).

5. *Repurchase and indemnification demands.* A repurchase or indemnification demand by Fannie Mae, Freddie Mac, HUD, VA, USDA, or RHS is not dispositive of qualified mortgage status. Qualified mortgage status under § 1026.43(e)(4) depends on whether a loan is eligible to be purchased, guaranteed, or insured at the time of consummation, provided that other requirements under § 1026.43(e)(4) are satisfied. Some repurchase or indemnification demands are not related to eligibility criteria at consummation. *See* comment 43(e)(4)-4. Further, even where a repurchase or indemnification demand relates to whether the loan satisfied relevant eligibility requirements as of the time of consummation, the mere fact that a demand has been made, or even resolved, between a creditor and GSE or agency is not dispositive for purposes of § 1026.43(e)(4). However, evidence of whether a particular loan satisfied the § 1026.43(e)(4) eligibility criteria at consummation may be brought to light in the course of dealing over a particular demand, depending on the facts and circumstances. Accordingly, each loan should be evaluated by the creditor based on the facts and circumstances relating to the eligibility of that loan at the time of consummation. For example:

i. Assume eligibility to purchase a loan was based in part on the consumer's employment income of $50,000 per year. The creditor uses the income figure in obtaining an approve/eligible recommendation from DU. A quality control review, however, later determines that the documentation provided and verified by the creditor to comply with Fannie Mae requirements did not support the reported income of $50,000 per year. As a result, Fannie Mae demands that the creditor repurchase the loan. Assume that the quality control review is accurate, and that DU would not have issued an approve/eligible recommendation if it had been provided the accurate income figure. The DU determination at the time of consummation was invalid because it was based on inaccurate information provided by the creditor; therefore, the loan was never a qualified mortgage under § 1026.43(e)(4).

ii. Assume that a creditor delivered a loan, which the creditor determined was a qualified mortgage at the time of consummation under § 1026.43(e)(4), to Fannie Mae for inclusion in a particular To-Be-Announced Mortgage Backed Security (MBS) pool of loans. The data submitted by the creditor at the time of loan delivery indicated that the various loan terms met the product type, weighted-average coupon, weighted-average maturity, and other MBS pooling criteria, and MBS issuance disclosures to investors reflected this loan data. However, after delivery and MBS issuance, a quality control review determines that the loan violates the pooling criteria.
eligibility requirements for Fannie Mae products and loan terms. Fannie Mae, however, requires the creditor to repurchase the loan due to the violation of MBS pooling requirements. Assume that the quality control review determination is accurate. Because the loan still meets Fannie Mae's eligibility requirements, it remains a qualified mortgage based on these facts and circumstances.

* * * * *

Dated: July 10, 2013.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2013–16962 Filed 7–23–13; 8:45 am]

BILLING CODE 4810–AM–P

FEDERAL REGISTER

Vol. 78 Wednesday,

No. 142 July 24, 2013

Part IV

Securities and Exchange Commission

17 CFR Parts 200, 230, 239, et al.

Disqualification of Felons and Other ''Bad Actors'' from Rule 506 Offerings; Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings; Amendments to Regulation D, Form D and Rule 156; Final Rules and Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 230, and 239

[Release No. 33–9414; File No. S7–21–11]

RIN 3235–AK97

Disqualification of Felons and Other ''Bad Actors'' From Rule 506 Offerings

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to our rules to implement Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 926 requires us to adopt rules that disqualify securities offerings involving certain ''felons and other 'bad actors''' from reliance on Rule 506 of Regulation D. The rules must be ''substantially similar'' to Rule 262 under the Securities Act, which contains the disqualification provisions of Regulation A under the Securities Act, and must also cover matters enumerated in Section 926 of the Dodd-Frank Act (including certain state regulatory orders and bars).

DATES: *Effective Date:* September 23, 2013.

Comment Date: Comments regarding the collection of information requirements within the meaning of the Paperwork Reduction Act of 1995 should be received on or before August 23, 2013.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/final.shtml*);
- Send an email to *rule-comments@sec.gov*.
- Please include File Number S7–21–11 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments on the Paperwork Reduction Act analysis in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–21–11. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/final.shtml*). Comments will also 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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Johanna Vega Losert, Special Counsel, Karen C. Wiedemann, Attorney Fellow, or Gerald J. Laporte, Office Chief, Office of Small Business Policy, Division of Corporation Finance, at (202) 551–3460, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: We are adopting amendments to Rules 145,[1] 147,[2] 152 [3] and 155;[4] Rules 501 [5] and 506 [6] of Regulation D;[7] and Form D [8] under the Securities Act of 1933 [9] and to Rule 30–1 [10] of our Rules of Organization and Program Management.

Table of Contents

I. Background and Summary

Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act''), entitled ''Disqualifying felons and other 'bad actors' from Regulation D offerings,'' requires the Commission to adopt rules to disqualify certain securities offerings from reliance on Rule 506 of Regulation D.[11] The Commission proposed rule amendments to implement Section 926 of the Dodd-Frank Act on May 25, 2011.[12] Today we are adopting amendments to Rules 501 and 506 and to Form D to implement Section 926. The disqualification provisions we are adopting, to be codified as new paragraph (d) of Rule 506,[13] are generally consistent with the proposal, but will apply only to triggering events occurring after effectiveness of the rule amendments (with pre-existing events

[1] 17 CFR 230.145.
[2] 17 CFR 230.147.
[3] 17 CFR 230.152.
[4] 17 CFR 230.155.
[5] 17 CFR 230.501.
[6] 17 CFR 230.506.
[7] 17 CFR 230.500 through 230.508.
[8] 17 CFR 239.500.
[9] 15 U.S.C. 77a *et seq.*
[10] 17 CFR 200.30–1.

[11] Public Law 111–203, sec. 926, 124 Stat. 1376, 1851 (July 21, 2010) (codified at 15 U.S.C. 77d note).

[12] *See Disqualification of Felons and Other ''Bad Actors'' from Rule 506 Offerings,* Release No. 33–9211 (May 25, 2011) [76 FR 31518 (June 1, 2011)].

[13] Because of the adoption of new Rule 506(c), the disqualification provisions we adopt today, which were proposed as Rule 506(c), will be adopted and codified as Rule 506(d).

subject to mandatory disclosure) and also reflect some changes in response to comments.

Rule 506 is one of three exemptive rules for limited offerings under Regulation D.[14] It is by far the most widely used Regulation D exemption, accounting for an estimated 90% to 95% of all Regulation D offerings [15] and the overwhelming majority of capital raised in transactions under Regulation D.[16] Rule 506 permits sales of an unlimited dollar amount of securities to be made without Securities Act registration, provided that the requirements of the rule are satisfied.

Rule 506 historically has permitted sales to an unlimited number of accredited investors [17] and up to 35 non-accredited investors, so long as there was no general solicitation, appropriate resale limitations were imposed, any applicable information requirements were satisfied, and the other conditions of the rule were met.[18] Section 201(a) of the Jumpstart Our Business Startups Act (''JOBS Act'') required the Commission to eliminate the prohibition against general solicitation and general advertising for offers and sales of securities made pursuant to Rule 506, provided that all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify their accredited investor status.[19] In a separate release today, we are adopting amendments to Rule 506 and Form D, including adding new paragraph (c) to Rule 506 to implement JOBS Act Section 201(a).[20] As a result, offers and sales of securities involving the use of general solicitation will be permitted under Rule 506, provided that the requirements of new Rule 506(c) are satisfied.

''Bad actor'' disqualification requirements, sometimes called ''bad boy'' provisions, disqualify securities offerings from reliance on exemptions if the issuer or other relevant persons (such as underwriters, placement agents and the directors, officers and significant shareholders of the issuer) have been convicted of, or are subject to court or administrative sanctions for, securities fraud or other violations of specified laws. Rule 506 in its current form does not impose any bad actor disqualification requirements.[21] In addition, because securities sold under Rule 506 are ''covered securities'' under Section 18(b)(4)(D) of the Securities Act, state-level bad actor disqualification rules do not apply.[22]

Section 926 of the Dodd-Frank Act instructs the Commission to issue disqualification rules for Rule 506 offerings that are ''substantially similar'' to the bad actor disqualification provisions contained in Rule 262 of Regulation A,[23] and also provides an expanded list of disqualifying events, including certain actions by state regulators, enumerated in Section 926. The disqualifying events listed in Rule 262 cover the issuer and certain other persons associated with the issuer or the offering, including: issuer predecessors and affiliated issuers; directors, officers and general partners of the issuer; beneficial owners of 10% or more of any class of the issuer's equity securities; promoters connected with the issuer; and underwriters and their directors, officers and partners. Rule 262 disqualifying events include:

- Felony and misdemeanor convictions in connection with the purchase or sale of a security or involving the making of a false filing with the Commission (the same criminal conviction standard as in Section 926 of the Dodd-Frank Act) within the last five years in the case of issuers and ten years in the case of other covered persons;
- Injunctions and court orders within the last five years against engaging in or continuing conduct or practices in

[14] The others are Rule 504 and Rule 505, 17 CFR 230.504 and 230.505. Rule 504 permits offerings of up to $1 million of securities by issuers that are not (i) reporting companies under the Securities Exchange Act of 1934, (ii) investment companies or (iii) development stage companies with no specific business plan or purpose, or whose business plan is to engage in a merger or acquisition with an unidentified entity or entities. Offerings under Rule 504 must generally comply with Regulation D requirements regarding limitations on manner of sale (no general solicitation) and limitations on resale. The manner of sale and resale limitations do not apply, however, to offerings that are subject to state-level registration or that rely on state law exemptions permitting general solicitation so long as sales are made only to accredited investors. Rule 505 permits offerings of up to $5 million of securities annually, without general solicitation, to an unlimited number of accredited investors and up to 35 non-accredited investors. Rule 505 offerings are subject to the same conditions as apply to Rule 506 offerings, which are described elsewhere, except that non-accredited investors are not required to be sophisticated and such offerings are subject to bad actor disqualification provisions.

[15] In 2012, the Commission received 18,187 initial filings for offerings under Regulation D, of which 17,203 (approximately 95%) claimed a Rule 506 exemption.

[16] Staff of the Commission's Division of Economic and Risk Analysis estimates that, for 2009, 2010, 2011 and 2012, approximately $607 billion, $1.003 trillion, $850 billion and $899 billion, respectively, was raised in transactions claiming the Rule 506 exemption, in each case representing more than 99% of funds raised under Regulation D for the period, based on Form D filings with the Commission. The amount of capital raised through offerings under Regulation D and the number of Regulation D offerings may be considerably larger than what is disclosed in Form D filings because the filing of a Form D notice is a requirement of Rule 503(a) of Regulation D [17 CFR 230.503(a)], but is not a condition to the availability of the exemptions of Regulation D. We understand that some issuers, therefore, may not make Form D filings for offerings made in reliance on Regulation D. Further, once a Form D filing is made, the issuer is not required to file an amendment to reflect a change that occurs after the offering terminates or a change that occurs solely with respect to certain information, such as the amount sold in the offering. For example, if the amount sold does not exceed the offering size by more than 10% or the offering closes before a year has passed, the filing of an amendment to Form D would not necessarily be required. Therefore, the Form D filings for an offering may not reflect the total amount of securities sold in the offering in reliance on the exemption.

[17] Rule 501 of Regulation D lists eight categories of ''accredited investor,'' including entities and natural persons that meet specified income or asset thresholds. *See* 17 CFR 230.501.

[18] Except as provided under new Rule 506(c), offerings under Rule 506 are subject to all the terms and conditions of Rules 501 and 502, including applicable limitations on the manner of offering, limitations on resale and, if securities are sold to any non-accredited investors, specified information requirements. Where securities are sold only to accredited investors, the information requirements do not apply. *See* 17 CFR 230.502 and 230.506. In addition, any non-accredited investors must satisfy the investor sophistication requirements of Rule 506(b)(2)(ii). Offerings under Rule 506 must also comply with the notice of sale requirements of Rule 503. *See* 17 CFR 230.503.

[19] *See* Public Law 112–106, sec. 201(a), 126 Stat. 306, 313 (Apr. 5, 2012).

[20] *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings,* Release No. 33–9415 (July 10, 2013).

[21] Rule 507 of Regulation D imposes a different kind of disqualification specific to Regulation D offerings. Under Rule 507, any person that is subject to a court order, judgment or decree enjoining such person for failure to file the notice of sale on Form D required under Rule 503 is disqualified from relying on Regulation D. 17 CFR 230.507(a). We are not amending Rule 507 at this time but, in a separate release the Commission is issuing today, we are proposing amendments to Rule 507 that would disqualify an issuer from reliance on Rule 506 if the issuer or its predecessor or affiliates had conducted a previous securities offering in reliance on Rule 506 without complying with the Form D filing requirements of Rule 503. *See Amendments to Regulation D, Form D, and Rule 156,* Release No. 33–9416 (July 10, 2013).

[22] *See* 15 U.S.C. 77r(b)(4)(D). This provision of Section 18 was added by Section 102(a) of the National Securities Markets Improvement Act of 1996, Pub. L. No. 104–290,110 Stat. 3416 (Oct. 11, 1996) (''NSMIA''). NSMIA preempts state registration and review requirements for transactions involving ''covered securities,'' which include securities offered or sold in transactions that are exempt from registration under Commission rules or regulations issued under Securities Act Section 4(a)(2) (formerly Section 4(2)). Rule 506 was originally adopted as a safe harbor under Section 4(a)(2). Section 201(a) of the JOBS Act provides that Rule 506, as amended in accordance with the mandate of that provision, ''shall continue to be treated as a regulation issued under'' Section 4(a)(2) of the Securities Act.

[23] 17 CFR 230.262. Regulation A (17 CFR 230.251 through 230.263) is a limited offering exemption that permits public offerings of securities not exceeding $5 million in any 12-month period by companies that are not required to file periodic reports with the Commission. Regulation A offerings are required to have an offering circular containing specified information, which is filed with the Commission and subject to review by the staff of the Division of Corporation Finance.

connection with the purchase or sale of securities, or involving the making of any false filing with the Commission;

• U.S. Postal Service false representation orders within the last five years;

• Filing, or being named as an underwriter in, a registration statement or Regulation A offering statement that is the subject of a proceeding to determine whether a stop order should be issued, or as to which a stop order was issued within the last five years; and

• For covered persons other than the issuer:

○ being subject to a Commission order:

▪ revoking or suspending their registration as a broker, dealer, municipal securities dealer, or investment adviser;

▪ placing limitations on their activities as such;

▪ barring them from association with any entity; or

▪ barring them from participating in an offering of penny stock; or

○ being suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or national securities association for conduct inconsistent with just and equitable principles of trade.

The disqualifying events specifically required by Section 926 are:

• Final orders issued by state securities, banking, credit union, and insurance regulators, federal banking regulators, and the National Credit Union Administration that either

○ bar a person from association with an entity regulated by the regulator issuing the order, or from engaging in the business of securities, insurance or banking, or from savings association or credit union activities; or

○ are based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct within a ten-year period; and

• Felony and misdemeanor convictions in connection with the purchase or sale of a security or involving the making of a false filing with the Commission.

On May 25, 2011, we proposed amendments to Rules 501 and 506 of Regulation D and Form D to implement Section 926.[24] We received 44 comment letters in response to our proposal.[25] In addition, we received three advance comment letters commenting on Section 926 before the publication of the proposing release.[26] These comment letters and advance comment letters came from a variety of individuals, groups and constituencies, including state securities regulators, professional and trade associations, lawyers, academics and individual investors. Most commenters expressed general support for the proposed amendments and the objectives that we articulated in the proposing release, but many suggested modifications to the proposals.

Today we are adopting amendments to Rules 501 and 506 of Regulation D and to Form D to implement Section 926 of the Dodd-Frank Act.[27] The amendments we are adopting are generally consistent with the proposal, with the following principal differences:

• Disqualification will apply only for triggering events that occur after the effective date of the amendments; however, pre-existing matters will be subject to mandatory disclosure;

• The rule includes additional disqualifying events for certain orders of the Commodity Futures Trading Commission (''CFTC'') and for Commission cease-and-desist orders arising out of scienter-based anti-fraud violations and violations of Section 5 of the Securities Act;

• Instead of covering all officers of the issuer and of any compensated solicitors of purchasers of securities, the rule is limited to executive officers and officers who participate in the offering;

• Rather than covering beneficial owners of 10% or more of any class of the issuer's securities, the rule covers beneficial owners of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power;

• For issuers that are pooled investment funds, the rule covers the funds' investment managers and their principals; and

• Disqualification will not apply if the authority issuing the relevant judgment, order or other triggering directive or statement determines and advises the Commission that disqualification from reliance on Rule 506 should not arise as a result.

Part III of the proposing release requested comment on a number of potential further rule amendments that would result in more uniform bad actor disqualification rules, including the application of the new bad actor disqualification standards to offerings under Regulation A, Regulation E and Rules 504 and 505 of Regulation D. Commenters were divided in their views with respect to uniform bad actor standards. Some commenters supported uniformity on the basis that it would enhance investor protection, increase clarity and consistency in our regulations and avoid the creation of opportunities for regulatory arbitrage.[28] Others opposed it, generally arguing that attempts to impose uniformity would be premature or inappropriate given the limits of the Dodd-Frank Act mandate, and that uniformity should be considered, if at all, in a separate rulemaking.[29]

We note that the JOBS Act requires us to adopt rules for two new exemptions from the Securities Act—one for ''crowdfunding'' offerings, contained in Title III of the JOBS Act, and one for offerings of up to $50 million in a 12-month period under Section 3(b) of the Securities Act, contained in Title IV of the JOBS Act. The statutory requirements for these exemptions contemplate bad actor disqualifications with language similar to that in Section 926 of the Dodd-Frank Act.[30] We are

[24] *See Disqualification of Felons and Other ''Bad Actors'' from Rule 506 Offerings,* Release No. 33–9211 (May 25, 2011) [76 FR 31518 (June 1, 2011)].

[25] The comment letters we received on the proposal are available on our Web site at *http://www.sec.gov/comments/s7-21-11/s72111.shtml.* In this release, we refer to these letters as the ''comment letters'' to differentiate them from the ''advance comment letters'' described in note 26.

[26] To facilitate public input on its Dodd-Frank Act rulemaking before issuance of rule proposals, the Commission provided a series of email links, organized by topic, on its Web site at *http://www.sec.gov/spotlight/regreformcomments.shtml.* In this release, we refer to comment letters we received on this rulemaking project in response to this invitation as ''advance comment letters.'' These advance comment letters appear on the Commission's Web site under the heading ''Adding Disqualification Requirements to Regulation D Offerings, Title IX Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.''

[27] We are also adopting technical amendments to Rules 145, 147, 152 and 155 to update references to Section 4(2) of the Securities Act, which was renumbered as Section 4(a)(2) by Section 201(c) of the JOBS Act, Public Law 112–106, sec. 201(c), 126 Stat. 306, 314 (Apr. 5, 2012).

[28] *See* comment letters from the Federal Regulation of Securities Committee, Business Law Section of the American Bar Association (Oct. 4, 2011) (''ABA Fed. Reg. Comm.''); Chris Barnard (June 1, 2011) (''C. Barnard''); North American Securities Administrators Association, Inc. (July 25, 2011) (''NASAA''); SNR Denton LLC on behalf of The Depository Trust & Clearing Corporation (July 14, 2011) (''DTC''); Better Markets, Inc. (July 14, 2011) (''Better Markets''); Whitaker Chalk Swindle & Schwartz, PLLC (July 30, 2011 (''Whitaker Chalk''); and Professor J. Robert Brown, Jr. (Feb. 1, 2012).

[29] *See* comment letters from the Committee on Securities Regulation of the New York City Bar Association (July 14, 2011) (''NYCBA''); Cravath, Swaine & Moore LLP, Davis Polk & Wardwell LLP, Gibson, Dunn & Crutcher LLP, Skadden, Arps, Slate, Meagher & Flom LLP and Wilmer Cutler Pickering Hale and Dorr LLP (July 14, 2011) (''Five Firms''); SW. Coy Capital, Inc. (July 13, 2011) (''Coy Capital'').

[30] For crowdfunding, the Commission is directed to adopt rules establishing disqualification provisions for issuers, brokers and funding portals seeking to participate in crowdfunding transactions. The requirement in Section 302(d) of the JOBS Act

working on separate rulemakings for these new exemptions. In light of these additional rulemakings, we have decided to limit the disqualification provisions adopted today to Rule 506 offerings. At the time of those rulemakings, we will have an opportunity to consider to what extent any bad actor disqualification provisions to be adopted in connection with those rules should differ from those applicable to Rule 506 offerings. At a later time, we will also have an opportunity to consider to what extent bad actor disqualifications currently applicable to Regulation A and Rule 505 offerings should be more uniform or similar to those applicable to Rule 506 offerings.

II. Discussion of the Final Amendments

A. Introduction

Section 926(1) of the Dodd-Frank Act requires the Commission to adopt disqualification rules that are substantially similar to Rule 262, the bad actor disqualification provisions applicable to offerings under Regulation A, and that also cover the triggering events specified in Section 926. In general, we understand this mandate to mean that the provisions we adopt to implement Section 926 should have similar effects as Rule 262, except to the extent that circumstances, such as the different context for the use of Rule 506 compared to Regulation A and the need to update or otherwise revise the provisions of Regulation A, dictate a different approach.

B. Covered Persons

We proposed amendments to Rule 506 of Regulation D to apply the disqualification provisions required under Section 926 to the following categories of persons:

- The issuer and any predecessor of the issuer or affiliated issuer;
- Any director, officer,[31] general partner or managing member of the issuer;
- Any beneficial owner of 10% or more of any class of the issuer's equity securities;
- Any promoter connected with the issuer in any capacity at the time of the sale;
- Any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with sales of securities in the offering; and
- Any director, officer, general partner, or managing member of any such compensated solicitor.[32]

The proposal reflected the categories currently covered by Rule 262 of Regulation A, with two modifications. First, because Rule 506 transactions may involve the use of persons paid for solicitation of purchasers, such as placement agents and finders, rather than traditional underwriters, we added compensated solicitors as a category of covered persons.[33] In addition, we proposed to add managing members to the list of directors, officers and general partners of the issuer and any underwriter or compensated solicitor to standardize the treatment of controlling persons of limited liability companies for disqualification purposes.

In the proposing release, we solicited comment on whether the rules should cover a broader or narrower group of persons. We specifically requested comment on whether the new disqualification provisions should cover all officers of issuers and covered financial intermediaries, as Rule 262 currently does, or only some officers (such as executive officers[34] and/or officers actually participating in the offering). We also requested comment on a variety of possible modifications to the scope of the coverage of shareholders and the possible inclusion of investment advisers of pooled investment funds.

Officers. Commenters generally supported limiting the coverage of the disqualification provisions to executive officers rather than all officers, citing such issues as the policy benefits of focusing on role rather than title;[35] the fact that executive officers of an issuer are recognized within Regulation D as ''accredited investors'' by virtue of their participation in the policy-making functions of the issuer;[36] the fact that certain entities have a large number of titular officers who do not have a policy or decision-making role or any involvement in the relevant offerings;[37] the potentially heavy compliance burden associated with broad application, which may make it difficult for issuers to meet a ''reasonable care'' standard;[38] and the obligation it would create for compensated solicitors to disclose the identities of their employees to issuers.[39] Some commenters argued for limiting the rule further as it applies to executive officers of compensated solicitors, and covering only executive officers that are engaged in the relevant private placement activities[40] or that are responsible for the approval or supervision of Rule 506 offerings.[41]

Two commenters advocated that the new rules mirror Rule 262's coverage of ''officers,'' as proposed.[42] These commenters argued both that a rule ''substantially similar'' to Rule 262 must include officers and that, based on the presumption of control that attaches to officers, the ability of officers to set the tone of an organization and the risk that any officer may be involved with any given offering, coverage of ''officers'' is needed for the protection of investors.

We also requested comment on whether the coverage of ''officers'' should be limited to officers who participate in or are involved with the offering. Two commenters addressed this point, acknowledging that it may be appropriate to cover participating officers to address investor protection concerns[43] and that doing so may be preferable to covering all officers.[44] Both commenters, however, expressed concern about the potential difficulty of determining which officers were

is identical to the language of Section 926 of the Dodd-Frank Act. For the new $50 million offering exemption, Section 401(b)(2) of the JOBS Act states that the Commission may require the issuer to meet certain conditions including disqualification provisions that are substantially similar to the disqualification provisions contained in regulations adopted in accordance with Section 926 of the Dodd-Frank Act, which we are adopting today.

[31] Under Rule 405, the term ''officer'' is defined as ''a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization.'' 17 CFR 230.405. This definition is applicable to Rule 262 by virtue of Rule 261, 17 CFR 230.261.

[32] *See* Release No. 33–9211, Part II.B (May 25, 2011).

[33] This is modeled on the disqualification provisions for offerings under Rule 505 which, like Rule 506 offerings, may involve the use of placement agents and finders, rather than traditional underwriters. *See* 17 CFR 230.505(b)(2)(iii)(B).

[34] The term ''executive officer'' is defined in Rule 501(f) of Regulation D (and in Rule 405) to mean a company's ''president, any vice president . . . in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions.'' 17 CFR 230.501(f), 230.405.

[35] *See* comment letters from DTC; NYCBA; Sullivan & Cromwell LLP (July 14, 2011) (''S&C'').

[36] *See* comment letter from ABA Fed. Reg. Comm.

[37] *See* comment letters from ABA Fed. Reg. Comm.; S&C; Cleary Gottlieb Steen & Hamilton LLP (July 14, 2011) (''Cleary Gottlieb''); Lehman & Eilen LLP (July 14, 2011) (''Lehman & Eilen'').

[38] *See* comment letters from ABA Fed. Reg. Comm.; Cleary Gottlieb; Five Firms; S&C; *see also* comment letter from Kutak Rock LLP (July 8, 2011) (''Kutak Rock'') (noting that a narrower rule would be more workable).

[39] *See* comment letter from Cleary Gottlieb.

[40] *See* comment letters from ABA Fed. Reg. Comm.; NYCBA.

[41] *See* comment letter from Lehman & Eilen.

[42] *See* comment letters from Better Markets; NASAA.

[43] *See* comment letter from Cleary Gottlieb.

[44] *See* comment letter from S&C.

actually involved with or participating in an offering.[45]

We agree with the majority of commenters that, in the context of Rule 506 offerings, an ''officer'' test based solely on job title would be unduly burdensome and overly restrictive. Consequently, the final rule covers only executive officers of covered entities and officers who participate in the offering. We believe that this coverage is an appropriate adaptation of the Rule 262 list of covered persons, taking into account the larger and more complex organizations that are involved in many Rule 506 transactions [46] as compared to the smaller entities that have used Regulation A, and, on that basis, this provision of the final rule is ''substantially similar'' to Rule 262. We note that the term ''officer'' in Rule 262 was used as early as 1955, before we adopted the ''executive officer'' concept that we use in several of our rules.[47] It also reflects a consideration of costs and benefits, focusing on situations where the risks that Section 926 is intended to address are at their most pronounced (when bad actors are performing policy-making functions or are personally involved with a securities offering) while alleviating the potential compliance burden by limiting covered persons to a more manageable number who should generally be easier to identify.

Many issuers will already have determined who their executive officers are (among other reasons, to provide disclosure about executive officers in the offering materials), and the officers participating in an offering will be a question of fact. Participation in an offering would have to be more than transitory or incidental involvement, and could include activities such as participation or involvement in due diligence activities, involvement in the preparation of disclosure documents, and communication with the issuer, prospective investors or other offering participants. We anticipate that issuers should be able to determine which of their own officers are participating in an offering without undue difficulty, and can exercise control over which officers participate. We also believe that it is reasonable to expect that compensated solicitors should be prepared to confirm which of their officers are participating in an offering as part of any engagement.

Beneficial Owners of Issuer Equity Securities. The inclusion of holders of 10% or more of any class of the issuer's equity securities as covered persons was one of the areas of the proposing release that attracted the most comment. The majority of commenters did not support the inclusion of 10% beneficial owners as covered persons for purposes of the Rule 506 disqualification provisions.[48] Several commenters identified a range of potential burdens and costs issuers would face in identifying 10% beneficial owners. They described the inclusion of 10% beneficial owners in the context of Rule 506 offerings as unduly burdensome,[49] with 10% holders potentially a ''moving target'' for issuers engaged in continuous sales and regular redemptions.[50] Others pointed out that a person could acquire 10% or more of a class of securities while having no input or control over the company's management, or even having an adversarial relationship with management.[51] One commenter questioned whether public companies would be able to comply with the rule.[52] Two commenters urged the Commission not to include beneficial owners as covered persons at all in the new disqualification rule.[53] Some commenters suggested higher ownership thresholds, from 20% to majority ownership [54] or a test based on actual control,[55] while others argued against an actual control test and in favor of a bright-line standard based on a stated percentage of ownership.[56]

Some commenters also supported including only voting equity securities, rather than all equity securities, in determining which securityholders should be covered persons, generally arguing that only voting interests confer control.[57] More specifically, one commenter recommended that the disqualification provision incorporate the definition of ''voting security'' contained in Section 2(a)(42) of the Investment Company Act,[58] which includes only securities presently entitling the holder to vote for the election of directors, so that these rules would apply only to a beneficial owner of equity securities of an issuer who was entitled to vote for the election of directors (or their equivalents) of the issuer.[59] Another suggested that the provision be limited to voting securities, including general partner and managing member interests, and exclude passive interests.[60]

Other commenters supported the proposed inclusion of 10% beneficial owners of any class of the issuer's equity securities, based on their presumptive control of the issuer and the mandate to adopt rules that are ''substantially similar'' to Rule 262, which covers 10% beneficial owners.[61]

We are persuaded, with the majority of commenters, that the Rule 262 standard of 10% ownership of any class of the issuer's equity securities could be overinclusive, pulling in securityholders who do not control the activities of the issuer and whose prior bad conduct may not reflect on the issuer or the current offering. It may

[45] *See* comment letters from Cleary Gottlieb; S&C.

[46] There is no cap on the amount of proceeds that may be raised in an offering relying on Rule 506, and many Rule 506 offerings are larger—in some cases, considerably larger—than would be permitted under the $5 million aggregate proceeds cap of Regulation A. For 2012, approximately 41% of Rule 506 offerings raised more than $5 million, 14% raised more than $50 million and 10% raised more than $100 million.

[47] *See Revision and Consolidation of Regulation A and Regulation D,* Release No. 33–3555 (July 18, 1955) [20 FR 5401 (July 28, 1955)].

[48] *See* comment letters from ABA Fed. Reg. Comm.; Cleary Gottlieb; Five Firms; Lehman & Eilen; NYCBA; S&C; Whitaker Chalk; the Investment Program Association (July 14, 2011) (''IPA''); Katten Muchin Rosenman LLP (July 14, 2011) (''Katten Muchin''); the Real Estate Investment Securities Association (July 14, 2011) (''REISA''); Seward & Kissel (July 20, 2011) (''Seward & Kissel''); the Securities Industry and Financial Markets Association (July 14, 2011) (''SIFMA'').

[49] *See* comment letter from Seward & Kissel.

[50] *See* comment letters from ABA Fed. Reg. Comm.; IPA.

[51] *See* comment letter from Lehman & Eilen; *see also* comment letters from ABA Fed. Reg. Comm.; Five Firms; S&C.

[52] *See* comment letter from ABA Fed. Reg. Comm. (pointing out that 10% beneficial owners have no obligation to disclose whether they are bad actors).

[53] *See* comment letters from ABA Fed. Reg. Comm.; Seward & Kissel.

[54] *See* comment letters from ABA Fed. Reg. Comm. (25% ownership threshold, consistent with the ''control'' presumption in Section 2(a)(5) of the Investment Company Act); NYCBA (20% or 25%); IPA (20%); Lehman & Eilen (25%, consistent with the thresholds used in other contexts under the federal securities laws, including Form BD); Cleary Gottlieb (20%, consistent with the level at which reporting as a ''passive'' investor under Regulation 13D–G is no longer permitted); S&C (25%, consistent with the ''control'' presumptions in Form BD and Section 2(a)(9) of the Investment Company Act); Whitaker Chalk (at least 25%, and disregard if there is a controlling shareholder or group); SIFMA (at least 25%, which would accord with Form BD and Section 2(a)(9) of the Investment Company Act, but would prefer 50%); Seward & Kissel (if coverage of shareholders cannot be eliminated, increase threshold to a majority).

[55] *See* comment letters from Kutak Rock; REISA; Five Firms; *see also* comment letters from Whitaker Chalk (advocating use of the ''affiliate'' standard in Rule 144) *and* Seward & Kissel (remove 10% beneficial owners from the list of covered persons, or increase the ownership threshold to a majority interest).

[56] *See* comment letters from Cleary Gottlieb; NYCBA; S&C.

[57] *See* comment letters from ABA Fed. Reg. Comm.; Kutak Rock; Lehman & Eilen; NYCBA; Whitaker Chalk; *see also* Seward & Kissel (objecting to the disqualification of pooled investment funds based on the conduct of a 10% passive equity owner).Comment letter from NYCBA.

[58] 15 U.S.C. 80a–2(a)(42).

[59] *See* comment letter from ABA Fed. Reg. Comm.

[60] *See* comment letter from NYCBA.

[61] *See* comment letters from Better Markets; DTC; NASAA; Bybel Rutledge LLP (July 11, 2011) (''Rutledge'').

therefore impose costs and burdens that are not justified in relation to the potential benefits. We considered in particular the underlying objectives of the bad actor rules, as well as the potential administrative complexity of monitoring fluctuating ownership levels resulting from continuous sales or regular redemptions by certain issuers, and an issuer's inability to control the actions of an adversarial or non-compliant securityholder who does not disclose whether its relationship to the issuer may trigger disqualification.

We agree with most commenters that it would be appropriate to limit the coverage of securityholders under new Rule 506(d) to those having voting rights. In light of the range of possible structures and control arrangements among issuers relying on Rule 506, however, we have not adopted a specific definition of ''voting securities.'' We intend that the term should be applied based on whether securityholders have or share the ability, either currently or on a contingent basis, to control or significantly influence the management and policies of the issuer through the exercise of a voting right.[62] For example, we would consider that securities that confer to securityholders the right to elect or remove the directors or equivalent controlling persons of the issuer, or to approve significant transactions such as acquisitions, dispositions or financings, would be considered voting securities for purposes of the rule. Conversely, securities that confer voting rights limited solely to approval of changes to the rights and preferences of the class would not be considered voting securities for purposes of the rule.

We are also concerned that measuring ownership based on the percentage beneficial ownership of any class of an issuer's securities, rather than of the issuer's total outstanding securities, may be both overinclusive and underinclusive. Where a class of securities represents a very small percentage of the issuer's outstanding equity securities or voting power, even a large percentage ownership of the class may not confer the kind of control or influence over the issuer that the bad actor disqualification rules are intended to address. At the same time, in the case of a class of supervoting or high vote securities, ownership of a relatively small percentage of that class may carry with it control over a relatively large percentage of total voting power. Accordingly, rather than including beneficial owners of any class of the issuer's equity securities, the final rule includes beneficial owners of a specified percentage of the issuer's total outstanding voting equity securities, calculated on the basis of voting power. This change will focus the rule on securityholders that have or share the ability to direct a substantial portion of a vote, and will avoid the potential overinclusiveness and underinclusiveness of a share-based or class-based calculation.

After considering commenters' concerns, we have also determined to raise the beneficial ownership threshold from 10% to 20%, which we believe is a reasonable and measured approach in the context of Rule 506 offerings that preserves investor protection and provides an efficient and clear ''bright-line'' test.[63]

Accordingly, the rules we adopt today cover beneficial owners of 20% or more of the issuer's outstanding equity securities, calculated on the basis of voting power, rather than 10% beneficial owners of any class of securities, as originally proposed.

We considered, but are not adopting, a standard based on actual control of the issuer. We share the concern voiced by some commenters [64] that a facts-and-circumstances based standard such as actual control would significantly increase the burden of inquiry associated with determining whether an offering was disqualified, and may give rise to unnecessary cost and uncertainty in the application of Rule 506(d). We believe that keeping a ''bright-line'' standard based on a specified level of ownership reduces the burden of compliance and responds to the statutory mandate to adopt a rule that is ''substantially similar'' to Rule 262.

Assessing beneficial share ownership based on ownership of total outstanding voting securities, based on voting power, rather than ownership of any class, and increasing the ownership threshold from 10% to 20% should ease the burden of compliance because there will be fewer beneficial owners to track. Nevertheless, we do not believe that the change will diminish the investor protection benefits of Rule 506(d) in the circumstances posing the highest potential risk to investors, when securityholders exercise actual control over the issuer, because such securityholders are likely to be covered persons in some other capacity. Under the functional definitions of ''director'' and ''executive officer,'' anyone who performs the functions of a director; controls a principal business unit, division or function of the issuer or performs policy making functions for the issuer will be a covered person as a director or executive officer of the issuer. In addition, as discussed below, shareholders that are ''promoters'' involved with the issuer will be covered in that capacity.

Investment Managers of Pooled Investment Funds. After further consideration and review of comment letters, we have determined to expand the list of covered persons to include investment managers [65] of issuers that are pooled investment funds; the directors, executive officers, other officers participating in the offering, general partners and managing members of such investment managers; and the directors and executive officers of such general partners and managing members and their other officers participating in the offering.[66] We requested comment on whether to include investment advisers of private funds, but did not propose to include them. Three commenters supported such an expansion to promote investor protection,[67] while six opposed it on a variety of bases, including that investment advisers are already subject to fiduciary duties and an extensive regulatory regime; [68] that persons who actually control a pooled investment fund issuer would likely be covered in other capacities, for example as promoters or through a position with

[62] We note that securityholders that have the ability to control or significantly influence the management and policies of the issuer through other means will generally be covered by Rule 506(d) in another capacity, such as, for example, as the functional equivalent of an ''executive officer'' or ''director'' of an issuer.

[63] We note that the 20% threshold aligns with the level of ownership at which filing as a ''passive investor'' on Schedule 13G under Regulation 13D–G is no longer permitted. *See* 17 CFR 230.13d–1(c).

[64] *See* comment letters from Cleary Gottlieb; NYCBA; S&C.

[65] We are using the term ''investment manager,'' rather than ''investment adviser'' as discussed in the proposing release. Under Section 202(a)(11) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–2(a)(11)] ''(the ''Advisers Act'')'', an ''investment adviser'' is generally a person or firm that, for compensation, is engaged in the business of providing advice, making recommendations, issuing reports, or furnishing analyses on securities. Some pooled investment funds invest in assets other than securities, such as commodities, real estate and certain derivatives. In order to ensure that Rule 506(d) covers the control persons of these funds, we are using a more general term, which encompasses both investment advisers and other investment managers.

[66] We are not adopting a definition of the term ''pooled investment fund'' as it is used in Rule 506(d). The term has been used in Form D for years in its ordinary and commonly understood sense, and we intend to use it in Rule 506(d) in the same way. The term should not be confused with ''pooled investment vehicle,'' a term defined more narrowly in Rule 206(4)–8 under the Advisers Act, 17 CFR 275.206(4)–8.

[67] *See* comment letters from Better Markets; DTC; NASAA.

[68] *See* comment letters from ABA Fed. Reg. Comm.; SIFMA; Whitaker Chalk.

the fund's general partner;[69] and that extending the rule in this way would be premature, would require a separate rulemaking project or would violate the ''substantially similar'' requirement.[70] We agree that, depending on the circumstances, investment managers that actually control a pooled investment fund may already be covered persons as ''promoters'' (a concept discussed in greater detail below), or as ''directors'' or ''executive officers'' of the issuer. We also note that the regulation of investment advisers has been subject to recent change, so that many investment managers to pooled investment funds that invest in securities are subject to new reporting and other obligations.[71] As a result of our reconsideration and review of the comment letters, however, we have determined to include investment managers to pooled investment funds and their principals as covered persons in the Rule 506 disqualification rules.[72]

Most operating companies making Rule 506 offerings are corporations or limited liability companies that function through their officers, directors and managing members. By comparison, most pooled investment funds making Rule 506 offerings are partnerships or other flow-through entities that have few, if any, employees, and function through their investment managers and the managers' personnel. In order to provide equivalent treatment of operating companies and pooled investment funds, the final rule establishes a new ''bright-line'' category of presumed control persons for pooled investment fund issuers. This should make the final rule clearer and easier to apply, and will more effectively protect investors from bad actors that exercise influence or control over a pooled investment fund.

Some commenters argued that adding fund investment managers was unnecessary, given that fund investment advisers are generally subject to regulation either at the state or the federal level. We believe our Securities Act disqualification rules are, in many respects, designed to supplement and build upon other enforcement and regulatory efforts. For instance, registered broker-dealers subject to limitations on their activities as a result of disciplinary proceedings could separately be disqualified from participating in a Rule 506 offering under the amendments we adopt today. We do not believe that the regulatory scheme to which a pooled investment fund's investment manager may be subject is a substitute for bad actor disqualification.

We appreciate that the bad actor provisions in Rule 262 do not cover investment managers of issuers that are pooled investment funds. Regulation A, however, is generally not available to or used by pooled investment funds,[73] so its disqualification provisions do not have to address the structure and governance arrangements typical of pooled investment fund issuers. Analogous disqualification rules under the Securities Act and the Investment Company Act do, however, include investment managers of pooled investment funds. For example, the disqualification provisions of Regulation E (which, like Regulation A, is an exemption from registration under Section 3(b)(1) of the Securities Act,[74] but is designed for use by pooled investment funds and similar entities) include as covered persons both the investment adviser to a pooled investment fund issuer as well as partners, directors, and officers of the investment adviser.[75] Similarly, Section 9(a) of the Investment Company Act automatically disqualifies investment advisers of registered investment companies (and certain affiliated persons) based on criminal convictions and certain court orders.[76]

We also recognize that, depending on the circumstances, some investment managers of pooled investment funds and certain of their personnel would be covered already under Rule 506(d), even if we did not expand the coverage of the rule. For example, some investment manager firms would be deemed to be ''promoters'' of a pooled investment fund issuer, and some of their individual principals would be deemed the functional equivalent of ''directors,'' ''executive officers'' or ''promoters'' of the issuer. Nevertheless, since we have concluded that such persons should be covered, we believe it is preferable to cover them directly, rather than indirectly. This treatment will avoid the necessity for issuers or others to engage in a potentially time-consuming, fact-intensive inquiry to determine whether or not they are within another category of covered persons.

Promoters. Although ''promoters'' are included as covered persons in Rule 262 [77] and were included as covered persons in the proposed rules for that reason, three commenters raised questions about the treatment of promoters under the new disqualification rules.[78] One suggested that directors, executive officers, general partners and managing members of promoters be included, so that promoters would be addressed in the rule in the same way as issuers and compensated solicitors.[79] The second questioned whether inclusion was necessary given the breadth of the other categories of covered persons, but suggested that if promoters are included, the term should be defined so as to include only persons who are involved with the offering and have a material financial interest in its outcome (or at a minimum, the rule should be revised to make clear that fund investment advisers are not deemed to be promoters).[80] The third argued that promoters should not be covered persons unless they are involved in the day-to-day management of the issuer or will be paid remuneration for the solicitation of purchasers.[81]

We determined not to make any changes in the definition or coverage of promoters. The category of ''promoter'' is broad, and captures all individuals and entities that have the relationships with the issuer or to the offering specified in Rule 405.[82] In particular, the definition requires issuers to look through entities and makes it

[69] *See* comment letter from Katten Muchin;

[70] *See* comment letters from Lehman & Eilen; Rutledge.

[71] *See Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF,* Release No. IA–3308 (Oct 31, 2011) [76 FR 71128]; *Rules Implementing Amendments to the Investment Advisers Act of 1940,* Release No. IA–3221 (June 22, 2011) [76 FR 42950].

[72] *See* Rule 506(d)(1).

[73] Regulation A by its terms is not available to any pooled investment fund that is an ''investment company registered or required to be registered under the Investment Company Act of 1940.'' 17 CFR 230.251(a)(4). As a practical matter, it is not available to other pooled investment funds because most such funds attempt to maintain that status under either Section 3(c)(1) or Section 3(c)(7) of that statute, which prohibits them from engaging in public offerings like those under Regulation A. *See* Investment Company Act secs. 3(c)(1), 3(c)(7), 15 U.S.C. 80a–3(c)(1), 80a–3(c)(7).

[74] 15 U.S.C. 77c(b)(1).

[75] 17 CFR 230.602(c).

[76] *See* 15 U.S.C. 80a–9(a).

[77] Rule 262(b) covers ''any promoter of the issuer presently connected with it in any capacity.'' The term ''promoter'' is defined in Rule 405 to mean any person who: (i) Acting alone or together with others, directly or indirectly takes initiative in founding or organizing the business or enterprise of an issuer; or (ii) in connection with the founding or organization of the business or enterprise of an issuer, directly or indirectly receives 10% or more of any class of issuer securities or 10% or more of the proceeds from the sale of any class of issuer securities (not including securities received solely as underwriting commissions or solely in exchange for property). The Rule 405 definition applies to Rule 262 by virtue of Rule 261. 17 CFR 230.261.

[78] *See* comment letters from Cleary Gottlieb; SIFMA; S&C.

[79] *See* comment letter from Cleary Gottlieb.

[80] *See* comment letter from S&C.

[81] *See* comment letter from SIFMA.

[82] *See* note 77.

unnecessary for us to separately cover the officers, directors and other control persons of entities that qualify as promoters. Rule 405 defines a promoter as any person—individual or legal entity—that either alone or with others, directly or indirectly takes initiative in founding the business or enterprise of the issuer, or, in connection with such founding or organization, directly or indirectly receives 10% or more of any class of issuer securities or 10% or more of the proceeds from the sale of any class of issuer securities (other than securities received solely as underwriting commissions or solely in exchange for property). The test considers activities ''alone or together with others, directly or indirectly''; therefore, the result does not change if there are other legal entities (which may themselves be promoters) in the chain between that person and the issuer.

As adopted, the disqualification provisions of Rule 506(d) will cover the following persons, which we refer to in this release as ''covered persons'':

- The issuer and any predecessor of the issuer or affiliated issuer;
- Any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer;
- Any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power;
- Any investment manager to an issuer that is a pooled investment fund and any director, executive officer, other officer participating in the offering, general partner or managing member of any such investment manager, as well as any director, executive officer or officer participating in the offering of any such general partner or managing member;
- Any promoter connected with the issuer in any capacity at the time of the sale;
- Any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with sales of securities in the offering (which we refer to as a ''compensated solicitor''); and
- Any director, executive officer, other officer participating in the offering, general partner, or managing member of any such compensated solicitor.[83]

We are also adopting a provision under which events relating to certain affiliated issuers are not disqualifying if they pre-date the affiliate relationship.[84] Rule 262(a)(5) currently provides that orders, judgments and decrees entered against affiliated issuers before the affiliation arose do not disqualify an offering if the affiliated issuer is not (i) in control of the issuer or (ii) under common control, together with the issuer, by a third party that controlled the affiliated issuer at the time such order, judgment or decree was entered. We included a similar provision in the proposal, but clarified that it applied to all potentially disqualifying events that pre-date affiliation. All of the commenters that addressed that point were supportive of the proposal,[85] and we are adopting it as proposed.

We also solicited comment on whether we should apply the disqualification rules differently to entities that have undergone a change of control. Five commenters supported differential treatment following a change of control, primarily arguing that entities act only through their personnel, and disqualifying events would no longer be relevant if the persons responsible for the events are no longer in control.[86] Another commenter argued that disqualification should cease to apply following changes of policy, as well as changes of control.[87] Three commenters opposed providing different treatment for entities that have undergone a change of control, generally noting that it would be difficult to establish whether a change of control had occurred, that such a provision could be susceptible to abuse, and that change of control might more appropriately be considered in the context of an application for waiver of disqualification.[88] We have decided to adopt the rules as proposed, as advocated by the latter group of commenters, and are not providing different treatment for entities that have undergone a change of control or a change of policy. We wish to avoid both undue complexity in application of the rules and potential abuse by bad actors that may claim to have undergone a change of control when no bona fide change of control has in fact occurred. As discussed in Part II.E below, we are amending the existing delegation of authority to the Director of the Division of Corporation Finance so it will cover waivers of disqualification under Rule 506. We expect that staff will adopt procedures for the prompt issuance of waivers of Rule 506 disqualification upon a proper showing that there has been a change of control and the persons responsible for the activities resulting in a disqualification are no longer employed by the entity or exercise influence over such entity.

C. Disqualifying Events

Section 926 of the Dodd-Frank Act requires our Rule 506 disqualification provisions to be ''substantially similar'' to those set forth in Rule 262 of Regulation A, and also to cover certain criminal convictions and regulatory orders enumerated in Section 926. In the proposal, the disqualifying events from Rule 262 and Section 926 were combined and integrated in a proposed rule that included the following disqualifying events:

- Criminal convictions (felony or misdemeanor), entered within the last five years in the case of issuers and ten years in the case of other covered persons, in connection with the purchase or sale of any security; involving the making of a false filing with the Commission; or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;[89]
- Court injunctions and restraining orders, including any order, judgment or decree of any court of competent jurisdiction, entered within five years before such sale, that, at the time of such sale, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice in connection with the purchase or sale of any security; involving the making of a false filing with the Commission; or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;[90]
- Final orders issued by state banking, credit union, and insurance regulators, federal banking regulators, and the National Credit Union Administration that either create a bar from association with any entity regulated by the regulator issuing the

[83] *See* Rule 506(d)(1).

[84] *See* Rule 506(d)(3).

[85] *See* comment letters from ABA Fed. Reg. Comm.; NYCBA; Rutledge; Whitaker Chalk; Alfaro Oil and Gas LLC (July 14, 2011) (''Alfaro'').

[86] *See* comment letters from ABA Fed. Reg. Comm.; Five Firms; Kutak Rock; Lehman & Eilen, Whitaker Chalk; *see also* comment letter from L. Burningham (June 29, 2011) (''Burningham'') (suggesting that issuers not be disqualified if they have removed bad actors).

[87] *See* comment letter from SIFMA (disqualification should apply only if senior management in control when disqualifying event arose are still employed by the issuer or a controlling affiliate continues in a senior management or executive role; disqualification should also cease to apply if issuer has implemented policies and procedures designed to prevent occurrence of activities that gave rise to disqualification, and such policies and procedures have been approved by a regulator or a court).

[88] *See* comment letters from DTC; NYCBA; Rutledge.

[89] *See* Proposed Rule 506(c)(1)(i).

[90] *See* Proposed Rule 506(c)(1)(ii).

order, or from engaging in the business of securities, insurance or banking or from savings association or credit union activities; or are based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct within the last ten years;[91]

- Commission disciplinary orders entered pursuant to Section 15(b) or 15(B)(c) of the Securities Exchange Act of 1934 (the ''Exchange Act'') or Section 203(e) or (f) of the Investment Advisers Act of 1940 (the ''Advisers Act'') that, at time of the sale, suspend or revoke a person's registration as a broker, dealer, municipal securities dealer or investment adviser; place limitations on the activities, functions or operations of such person; or bar such person from being associated with any entity or from participating in the offering of any penny stock;[92]
- Suspension or expulsion from membership in, or suspension or a bar from association with a member of, an SRO, *i.e.,* a registered national securities exchange or a registered national or affiliated securities association;[93]
- Stop orders applicable to a registration statement and orders suspending the Regulation A exemption for an offering statement that an issuer filed or in which the person was named as an underwriter within the last five years and being the subject at the time of sale of a proceeding to determine whether such a stop or suspension order should be issued;[94] and
- U.S. Postal Service false representation orders including temporary or preliminary orders entered within the last five years.[95]

We solicited comment on a number of possible modifications to the list of disqualifying events, such as including additional events and lengthening or shortening the look-back period associated with each event. Following is a discussion of each of the disqualifying events originally proposed, the comments on the proposal and the disqualifying event as adopted today.

1. Criminal Convictions

Section 926(2)(B) of the Dodd-Frank Act provides for disqualification if any covered person ''has been convicted of any felony or misdemeanor in connection with the purchase or sale of any security or involving the making of any false filing with the Commission.'' This essentially mirrors the language of Rule 262(a)(3), which covers criminal convictions of issuers, and Rule 262(b)(1), which covers criminal convictions of other covered persons. In the proposing release, we identified two differences between the felony and misdemeanor conviction provisions of Section 926(2)(B) and Rule 262. First, Section 926(2)(B) does not include a specific time limit (or ''look-back period'') on convictions that trigger disqualification, whereas Rule 262 provides a five-year look-back period for criminal convictions of issuers and a ten-year look-back period for criminal convictions of other covered persons. Second, Rule 262 includes a reference to criminal convictions ''arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer or investment adviser,'' which does not appear in Section 926.

The proposed rule was based on Rule 262, and provided that a covered person would be disqualified if such covered person has been convicted, within ten years before such sale (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor in connection with the purchase or sale of any security; involving the making of any false filing with the Commission; or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities.[96]

The proposed rule included look-back periods of five years for criminal convictions of issuers (including predecessors and affiliated issuers) and ten years for other covered persons, which correspond to Rule 262.[97] We requested comment on whether the scope of the provision should be broader or narrower, and whether a longer, or permanent, look-back period would be appropriate for either issuers or other covered persons.

Commenters were divided in their reaction to this aspect of the proposal. Most commenters argued that the Commission should stay close to the language of Section 926 and Rule 262.[98] One commenter criticized the proposal as overbroad and suggested ways to narrow it,[99] while two commenters urged expansion of the rule to cover a broader range of criminal convictions.[100] In an advance comment letter[101] and again in its comment letter, NASAA argued for extension of the disqualification rules to cover all criminal convictions involving fraud or deceit, as well as convictions involving the making of a false filing with any state, involving a commodity future or option contract, or any aspect of a business involving securities, commodities, investments, franchises, insurance, banking or finance. One other commenter supported extending coverage to all criminal convictions involving fraud or deceit.[102] Three commenters expressly opposed NASAA's suggested extension on the basis that it would create a vague and overbroad standard.[103]

On the length of look-back periods, some commenters argued for a uniform ten-year period,[104] some for longer or permanent disqualification in certain cases,[105] some for the five- and ten-year periods proposed,[106] and some for shorter periods for covered persons and issuers.[107] On whether convictions in foreign courts should be considered, most commenters objected, generally citing due process concerns and concerns about the cost and burden of inquiry into foreign proceedings.[108] Four commenters supported adding foreign convictions, generally on the basis that conduct outside the United States was as relevant as conduct within the United States for disqualification purposes.[109] One commenter suggested

[91] *See* Proposed Rule 506(c)(1)(iii).

[92] *See* Proposed Rule 506(c)(1)(iv).

[93] *See* Proposed Rule 506(c)(1)(v).

[94] *See* Proposed Rule 506(c)(1)(vi).

[95] *See* Proposed Rule 506(c)(1)(vii).

[96] Proposed Rule 506(c)(1)(i).

[97] Consistent with Rule 262, the look-back period is to the date of the conviction, not to the date of the conduct that led to the conviction. The measurement date is the date of the relevant order or other sanction, not the date of the conduct that was the subject of the order or other sanction.

[98] *See* comment letters from Rutledge; Five Firms; S&C; Seward & Kissel; SIFMA; NYCBA.

[99] *See* comment letter from REISA (suggesting limiting false filings provision to ''intentional, material and misleading'' false filings and limiting convictions ''arising out of the business'' to those ''directly related to the offer or sale of securities to investors'').

[100] *See* comment letters from NASAA; Better Markets.

[101] *See* advance comment letter from NASAA (Nov. 4, 2010).

[102] *See* comment letter from Better Markets.

[103] *See* comment letters from NYCBA; S&C; SIFMA.

[104] *See* comment letters from Better Markets; Kutak Rock; *see also* comment letters from NASAA (uniform look-back period of at least ten years); DTC (ten-year look-back except permanent disqualification for securities fraud and violations of Rule 506).

[105] *See* comment letters from DTC (permanent disqualification for securities fraud and Section 5 violations); J. Davis (June 13, 2011) (suggesting that conviction of any securities violation or felony should be permanently disqualifying).

[106] *See* comment letters from Cleary Gottlieb; Rutledge.

[107] *See* comment letters from REISA (uniform five-year period); D. Sarna (August 23, 2011) (uniform five-year period); SIFMA (uniform period not longer than one year).

[108] *See* comment letters from Cleary Gottlieb; Five Firms; NYCBA; S&C; Sullivan & Worcester LLP (July 1, 2011) (''S&W''); SIFMA; Whitaker Chalk.

[109] *See* comment letters from C. Barnard; DTC; Better Markets; advance comment letter from NASAA.

that Section 926(2)(B) could be read not to be limited to U.S. proceedings.[110]

In sum, most commenters agreed that the final rules should be closely based on Rule 262. To the extent that commenters advocated changes from the proposal, however, there was no consensus about what changes would be desirable or appropriate. We do not believe that the shift from Regulation A to potentially larger and more complex transactions under Rule 506 warrants either expanding or narrowing the scope of coverage of criminal convictions, or modifying the existing five- and ten-year look-back periods. Given that the rule is required to be ''substantially similar'' to Rule 262, and that there are no changes warranted by the application to the Rule 506 context, we are adopting the provision as proposed.

2. Court Injunctions and Restraining Orders

Under current Rule 262(a)(4), an issuer is disqualified from reliance on Regulation A if it, or any predecessor or affiliated issuer, is subject to a court injunction or restraining order against ''engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with the Commission.'' [111] Similarly, under current Rule 262(b)(2), an offering is disqualified if any other covered person is subject to such a court injunction or restraining order, or to one ''arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer or investment adviser.'' [112] Disqualification is triggered by temporary or preliminary injunctions and restraining orders that are currently in effect, and by permanent injunctions and restraining orders entered within the last five years.[113]

The proposed provision reflected the substance of these two provisions in a simplified, combined format. Rule 506 transactions may involve compensated solicitors, rather than traditional underwriters, so the proposed rule also covered orders arising out of the conduct of the business of such compensated solicitors. Under the proposal, an offering would be disqualified if any covered person is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before any sale in the offering that, at the time of such sale, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice in connection with the purchase or sale of any security; involving the making of any false filing with the Commission; or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities.[114]

Five commenters recommended adoption of the provisions as proposed.[115] Two commenters suggested narrowing the coverage of orders arising out of the conduct of the business of the listed financial intermediaries, and limiting the provision either to cases where there is a finding of fraudulent, manipulative or deceptive conduct,[116] or to matters relating to a broker-dealer's activities of offering securities as a placement or selling agent or underwriter.[117] Two commenters argued that court orders and judgments should not trigger disqualification unless the defendant was afforded notice and an opportunity to appear.[118] One such commenter went further to recommend that all appeals should have been exhausted or the time for appeal expired before disqualification is triggered.[119]

One commenter requested clarification that disqualification will apply only for persons specifically named in an order, and not to all who may be within a class of persons brought within the scope of an order.[120] For example, an injunction may be issued against a named defendant ''and its agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice'' of the order. The commenter requested confirmation that, in these circumstances, only the named defendant, and not all members of the class of persons brought within the scope of the order, would be understood as ''subject to'' the order for disqualification purposes.

We are adopting the provision as proposed. We see no basis for departing from the coverage and look-back periods that apply under existing Rule 262. In particular, we have determined not to impose due process requirements, such as notice and an opportunity to appear, or to require that all appeals have been exhausted or the time for appeal expired, as a condition to disqualification. We are sensitive to the concerns raised by commenters about the risk that ex parte orders may trigger disqualification. Nevertheless, in light of the statutory mandate and the Commission's waiver authority, we are not narrowing the provision. We believe that disqualifying events that arise out of such circumstances are better addressed through the waiver process.

We are also not persuaded that the shift to potentially larger, more complex transactions under Rule 506 or other considerations justifies such a change from the Rule 262 standards. Nor do we want to add a significant new burden of inquiry, requiring issuers to determine not just that a covered person is subject to an order, but also that the order is procedurally adequate. On balance, we believe that the risk that disqualification may arise from ex parte proceedings could be better addressed through the waiver process, rather than through additional requirements for factual inquiry that would affect all offerings. As for appealable orders, as noted in the proposing release, we are concerned that suspending disqualification during the pendency of a potentially lengthy appeals process may significantly undermine the intended benefits of the rule.[121]

With regard to who would be viewed as subject to an order, we intend to apply the new provisions consistently with the way that Rule 262 has historically been applied. For disqualification purposes, the staff has interpreted Rule 262 to limit those considered ''subject to'' an order to only the persons specifically named in the order.[122] Others who are not specifically

[110] *See* comment letter from Rutledge.

[111] 17 CFR 230.262(a)(4).

[112] 17 CFR 230.262(b)(2).

[113] Disqualification is triggered only when a person ''is subject to'' a relevant injunction or order. Therefore, injunctions and orders that have expired or are otherwise no longer in effect are not disqualifying, even if they were issued within the relevant look-back period. For example, an injunction issued four years before the relevant securities offering (within the five-year look-back period), and then lifted before the offering occurred, would not be disqualifying. The look-back period functions as a cut-off for injunctions and orders that are still in effect at the time of an offering. For example, disqualification will not arise from an injunction issued more than five years before an offering, even if the injunction is permanent.

[114] Proposed Rule 506(c)(1)(ii).

[115] *See* comment letters from Cleary Gottlieb; Lehman & Eilen; NYCBA; Rutledge (arguing, as to look-back periods in particular, that ''substantially similar'' means that new rules should mirror as much as possible existing Rule 262 provisions); SIFMA.

[116] *See* comment letter from NYCBA (acknowledging that the limitation they recommend may not be ''substantially similar'' to Rule 262).

[117] *See* comment letter from SIFMA.

[118] *See* comment letters from ABA Fed. Reg. Comm.; R. Sherman (May 25, 2011).

[119] *See* comment letter from ABA Fed. Reg. Comm.

[120] *See* comment letter from ABA Fed. Reg. Comm.

[121] Disqualification would be terminated immediately, however, if the judgment or order were reversed or vacated.

[122] For a more general discussion of interpretations of the meaning of ''subject to'' an order, *see* note 156 and accompanying text.

named but who come within the scope of an order (such as, for example, agents, attorneys and persons acting in concert with the named person) will not be treated as ''subject to'' the order for purposes of disqualification.

3. Final Orders of Certain Regulators

The text of Section 926(2)(A) of the Dodd-Frank Act provides that Commission requirements for Rule 506 offerings must disqualify any covered person that

(A) is subject to a final order of a State securities commission (or an agency or officer of a State performing like functions), a State authority that supervises or examines banks, savings associations, or credit unions, a State insurance commission (or an agency or officer of a State performing like functions), an appropriate Federal banking agency, or the National Credit Union Administration, that—

(i) bars the person from—

(I) association with an entity regulated by such commission, authority, agency, or officer;

(II) engaging in the business of securities, insurance, or banking; or

(III) engaging in savings association or credit union activities; or

(ii) constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct within the 10-year period ending on the date of filing of the offer or sale.

As we noted in the proposing release, Section 926(2)(A) is essentially identical to Section 15(b)(4)(H) of the Exchange Act and Section 203(e)(9) of the Advisers Act. The only difference is that Section 926(2)(A)(ii) contains a ten-year look-back period for final orders based on violations of laws and regulations that prohibit fraudulent, manipulative and deceptive conduct, while the Exchange Act and Advisers Act provisions have no express time limit for such orders.

We proposed to reflect Section 926(2)(A) as new Rule 506(c)(1)(iii), with three changes from the text of Section 926(2)(A), which were intended to eliminate potential ambiguities and allow for easier application of the rule. First, the proposal specified that an order must bar the covered person ''at the time of [the] sale,'' to clarify that a bar would be disqualifying only for as long as it has continuing effect. Second, the provision measured the look-back period from the date of the relevant sale, not from ''the date of filing of the offer or sale,'' as provided in Section 926 of the Dodd-Frank Act, so it would align with the other look-back periods in the rule. Finally, the provision required that orders must have been ''entered'' within the look-back period, to clarify that the date of the order, and not the date of the underlying conduct, was relevant for that determination.

Under the proposal, an offering would be disqualified if any covered person is subject to a final order of a state securities commission (or an agency or officer of a state performing like functions); a state authority that supervises or examines banks, savings associations, or credit unions; a state insurance commission (or an agency or officer of a state performing like functions); an appropriate federal banking agency; or the National Credit Union Administration that at the time of such sale, bars the person from association with an entity regulated by such commission, authority, agency, or officer; engaging in the business of securities, insurance or banking; or engaging in savings association or credit union activities; or constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such sale.[123]

We solicited comment on a number of aspects of the proposed provision, including the treatment of bars, the definition of the terms ''final order'' and ''fraudulent, manipulative and deceptive conduct,'' and the potential to cover orders of other regulators in addition to those mandated by Section 926 of the Dodd-Frank Act, particularly the Commission and the Commodity Futures Trading Commission (''CFTC''). As discussed in more detail below, we are adopting the provision substantially as proposed, but adding the CFTC to the list of regulators whose regulatory bars and other final orders will trigger disqualification.

CFTC Orders. The proposing release solicited comment on whether orders of the CFTC or any other regulator not referred to in Section 926 should result in disqualification from Rule 506 offerings. Four commenters favored adding CFTC orders as a disqualification trigger.[124] One noted that ''conduct that would typically give rise to a CFTC sanction is similar to the type of conduct that would result in disqualification if it were the subject of action by other regulators in the securities, banking and insurance fields.''[125] Others cited benefits such as improved investor protection, harmonization of the treatment of regulatory entities, and improved internal consistency of the bad actor rules.[126] Another asserted that it was ''obvious'' that at least some CFTC orders should be covered by the disqualification rules.[127] Two of these commenters also recommended that the rules cover orders of additional regulators.[128] Seven comment letters opposed adding CFTC orders, generally arguing that such an addition would not be ''substantially similar'' to Rule 262 and questioning the Commission's legal authority to add such a new disqualifying event.[129]

We are persuaded that appropriate CFTC orders should be included as a disqualification trigger in new Rule 506(d). As we noted in the proposing release, the conduct that would typically give rise to CFTC sanctions is similar to the type of conduct that would result in disqualification if it were the subject of sanctions by another financial services industry regulator. For that reason, CFTC orders trigger consequences under other Commission rules (for example, both registered broker-dealers and investment advisers may be subject to Commission disciplinary action based on violations of the Commodity Exchange Act).[130] In addition, the CFTC (rather than the Commission) has authority over the investment managers of pooled investment funds that invest in commodities and certain derivatives products; unless Rule 506(d) covers CFTC orders, regulatory sanctions against those investment managers are not likely to trigger disqualification. For these reasons, we believe that including orders of the CFTC will make the bad actor rules more internally consistent, treating relevant sanctions similarly for disqualification purposes, and should enable the disqualification rules to more effectively screen out felons and bad actors.

We have decided to include CFTC orders in the bad actor disqualification scheme by adding the CFTC to the list of regulators in Rule 506(d)(1)(iii). As a result, disqualification will be triggered

[123] Proposed Rule 506(c)(1)(iii).

[124] *See* comment letters from Better Markets, Cleary Gottlieb, NYCBA, NASAA.

[125] *See* comment letter from Better Markets.

[126] *See* comment letters from Cleary Gottlieb, NASAA.

[127] *See* comment letter from NYCBA.

[128] *See* comment letters from Better Markets (advocating addition of orders by other agencies with jurisdiction over misconduct in the financial services arena, including the Consumer Financial Protection Bureau and the Federal Trade Commission); NASAA (advocating addition of orders under state franchise, investment and finance laws).

[129] *See* comment letters from ABA Fed. Reg. Comm.; Five Firms; Katten Muchin; Lehman & Eilen; Rutledge; Schuyler Roche; SIFMA.

[130] *See, e.g.,* Section 15(b)(4)(D) of the Exchange Act (15 U.S.C. 80(b)(4)(C)) and Section 203(e)(5) of the Advisers Act (15 U.S.C. 80-b3(e)(5)).

only by CFTC orders that constitute ''bars'' or ''final orders'' relating to prohibitions on ''fraudulent, manipulative or deceptive conduct'' on the basis discussed below.

Bars. Our requests for comment focused on whether there was a need for the Commission to explicitly state that all orders that have the practical effect of a bar (prohibiting a person from engaging in a particular activity) should be treated as such, even if the relevant order did not call it a ''bar.'' We also requested comment on whether it would be appropriate to provide a cut-off date (for example, ten years) for permanent bars.

Several commenters urged us to provide additional guidance about what constitutes a bar.[131] We believe the statutory language is clear: bars are orders issued by one of the specified regulators that have the effect of barring a person from association with certain regulated entities; from engaging in the business of securities, insurance or banking; or from engaging in savings association or credit union activities. Any such order that has one of those effects is a bar, regardless of whether it uses the term ''bar.'' Orders that do not have any of those effects are not bars, although they may be disqualifying ''final orders,'' as discussed below.

Consistent with the proposal, the final rule provides that an order must bar the person ''at the time of [the] sale'' from one or more of the specified activities, to make clear that a bar is disqualifying only for as long as it has continuing effect.[132] Thus, for example, a person who was barred indefinitely, with the right to apply to reassociate after three years, would be disqualified until such time as he or she is permitted to reassociate, assuming that the bar had no continuing effect after reassociation. Several commenters argued that we should impose a cut-off date for permanent bars.[133] This would effectively treat permanent bars the same as other final orders, which are disqualifying only if issued during the look-back period. We are not, however, departing from the current standard under Rule 262 either by imposing a look-back period (making all regulatory bars issued within a specified period before a sale disqualifying, even if no longer in effect) or by imposing a cut-off date (which would make bars no longer disqualifying after the requisite time period has passed, even if the bar is permanent or otherwise still in effect). Under Rule 262, bars are disqualifying for as long as they are in effect but no longer, matching the period of disqualification to the duration of the regulatory sanction. We are adopting the same approach for Rule 506. Persons who are subject to an indefinite bar who do not wish to reassociate but do wish to participate in Rule 506 offerings could consider applying for a waiver.

We recognize that, in the proposal and in the final rule, the treatment of court injunctions and restraining orders, on one hand, and regulatory bars and orders, on the other hand, is different in some respects. Court injunctions and restraining orders are subject to a five-year look-back period, which functions as a cut-off (*i.e.,* injunctions and restraining orders issued more than five years before the relevant sale are no longer disqualifying, even if they are still in effect or permanent). The treatment of court injunctions and restraining orders is consistent with Rule 262, and therefore responds to the requirement to develop a ''substantially similar'' rule, while the treatment of regulatory bars and orders is specifically mandated by Section 926 of the Dodd-Frank Act. Commenters did not generally support harmonizing our approach to court injunctions and restraining orders with the mandated treatment of regulatory bars and orders, and we do not believe that the shift from Regulation A to Rule 506 offerings justifies extending the time period for disqualification associated with court injunctions and restraining orders.

Final Orders. Section 926 of the Dodd-Frank Act does not specify what should be deemed to constitute a ''final order'' that triggers disqualification. The proposal included an amendment to Rule 501 to provide a definition of ''final order,'' based on the definition that the Financial Industry Regulatory Authority (''FINRA'') uses in forms that implement language in Section 15(b)(4)(H) of the Exchange Act, which is identical[134] to the language used in Section 926.[135] Under the proposal, ''final order'' would mean ''a written directive or declaratory statement issued pursuant to applicable statutory authority and procedures by a federal or state agency described in § 230.506(c)(1)(iii), which constitutes a final disposition or action by that federal or state agency.''

The proposing release requested comment on other potential approaches to the term ''final order,'' such as whether the rule should consider orders final only if they are non-appealable, and whether the rule should cover only orders issued in a process that provides for certain due process rights, such as notice, a right to be heard, and a requirement for a record with written findings of fact and conclusions of law. We also queried whether disqualifying matters that arose in the context of a settlement with a regulatory authority should be treated the same as non-settled matters. The proposing release also discussed whether the Commission should defer to the regulator issuing the order to determine whether the issued order was a ''final order'' for purposes of disqualification in Rule 506.

Several commenters agreed that a definition of ''final order'' would be helpful in promoting uniform and predictable treatment of regulatory actions.[136] Four commenters were generally supportive of the proposed definition.[137]

Two commenters suggested adding minimum procedural standards to the definition of ''final order.''[138] One advocated building ''basic due process elements'' into the definition by adding the concept of notice and an opportunity for a hearing.[139] This commenter suggested that, in order to ensure that settled matters would be treated the same as litigated matters, the definition should require ''an opportunity for hearing'' rather than some specified actual proceeding.[140] The other commenter recommended that, for an order to constitute a ''final order,'' a regulator ''must have made a

[131] *See* comment letters from Alfaro; ABA Fed. Reg. Comm.; Rutledge; SIFMA; Whitaker Chalk.

[132] This accords with the Commission's interpretive position on Rule 262. *See* Release No. 33–6289 (Feb. 13, 1981) [46 FR 13505, 13506 (Feb. 23, 1981)] (Commission consistently has taken the position that a person is ''subject to'' an order under Section 15(b), 15B(a) or (c) of the Exchange Act or Section 203(e) or (f) of the Advisers Act only so long as some act is being performed (or not performed) pursuant to the order). *See* note 156 and accompanying text.

[133] *See* comment letters from ABA Fed. Reg. Comm.; Katten Muchin; Lehman & Eilen; Rutledge; Schuyler, Roche & Crisham, P.C. (July 14, 2011) (''Schuyler Roche''); SIFMA.

[134] Note, however, that Section 15(b)(4)(H) does not contain a look-back period, unlike the 10-year look-back period specified in Section 926(2)(A)(ii).

[135] The definition of ''final order'' used by FINRA applies to Forms U4, U5 and U6, which are used for reporting the disciplinary history of broker-dealers and associated persons under Exchange Act Section 15(b)(4)(H). Form U4 is the Uniform Application for Securities Industry Registration or Transfer, used by broker-dealers to register associated persons. Form U5 is the Uniform Termination Notice for Securities Industry Registration, used by broker-dealers to report the termination of an associated person relationship. Form U6 is the Uniform Disciplinary Action Reporting Form, used by SROs and state and federal regulators to report disciplinary actions against broker-dealers and associated persons.

[136] *See, e.g.,* letters from NYCBA; Rutledge; SIFMA.

[137] Letters from C. Barnard; Rutledge; Better Markets; Munck Carter, LLP (July 14, 2011) (''Munck Carter'').

[138] Letters from NYCBA; SIFMA.

[139] Letter from NYCBA.

[140] *Id.*

finding of fact and set forth conclusions of law on a record.'' [141]

Taking into account the potential impact of disqualification on issuers and other market participants, we are persuaded that the definition of ''final order'' should be limited to orders issued under statutory authority—including statutes, rules and regulations—that provides for notice and an opportunity for hearing.[142] As a result, under our final definition, *ex parte* orders issued under statutory authority that does not provide for notice and an opportunity for hearing will not trigger disqualification. We are not, however, imposing procedural requirements beyond a basic requirement that notice and opportunity for hearing be provided for in the statutes, rules and regulations under which an order is issued. The proceedings covered in Rule 506(d)(1)(iii) take many different forms, and it would not be appropriate for our rules to impose procedural requirements that may not be met by the proceedings of every state or federal regulator whose orders are required to trigger disqualification under Section 926 of the Dodd-Frank Act. We are also not requiring that a hearing actually have occurred. There may be no hearing, for example, in the context of a settled matter; however a settlement is considered for this purpose to have been made after an opportunity for hearing. The basic requirement we have included should be sufficient to address the fundamental fairness concern.

We believe that focusing on the nature of the relevant legal authority for an order rather than the particular facts and circumstances surrounding the order will provide more certainty to issuers seeking to determine whether a covered person subject to an order is in fact subject to a ''final order'' that would be disqualifying. An issuer would only need to determine whether the statutory authority provided for these procedural safeguards, not whether in fact notice was given and an opportunity for hearing was provided. This approach is consistent with comment we received stressing the importance of making the disqualification provisions clear and simple to administer, based on ''bright line'' provisions or an ''objective test'' wherever possible.[143] The focus on legal authority rather than the facts of each case will also likely reduce the incidence of covered persons, in an effort to participate in an offering, claiming procedural irregularities where such irregularities did not occur. A market participant that is subject to an order that was issued without in fact receiving notice and an opportunity for hearing will be able to challenge the order itself, and may also seek a waiver of disqualification from the Commission.

We do not believe that limiting final orders in this way will compromise investor protection because, in most instances, *ex parte* orders are of short duration and will either expire or be replaced by a subsequent order that would meet our procedural requirements.

Commenters were divided on the question of whether orders should be deemed final if they are still subject to appeal. Three commenters objected to adding a requirement that final orders be non-appealable, generally on the basis that the resulting delay could compromise investor protection.[144] Three other commenters argued that the definition of ''final order'' should be limited to non-appealable orders.[145] We remain concerned that delay incident to the appeals process could undermine the intended benefits of the rule, and are therefore adopting the definition of ''final order'' without a requirement that the order be non-appealable.[146]

As adopted, the definition of ''final order'' contained in new Rule 501(g) provides that ''final order'' shall mean a written directive or declaratory statement issued by a federal or state agency described in § 230.506(d)(1)(iii) under applicable statutory authority that provides for notice and an opportunity for hearing, which constitutes a final disposition or action by that federal or state agency.

Fraudulent, Manipulative or Deceptive Conduct. Section 926(2)(A)(ii) of the Dodd-Frank Act provides that disqualification must result from final orders of the relevant regulators that are ''based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct.'' In light of the specificity of the language of Section 926, the proposal did not include standards or guidance with respect to what constitutes ''fraudulent, manipulative or deceptive conduct.''

In the proposing release we solicited comment on whether the rule should provide a definition for ''fraudulent, manipulative or deceptive conduct'' and, if we provided a definition, what should be included in such a definition. Recognizing that Section 926(2)(A)(ii) refers to the final orders of the relevant regulators, the proposing release also requested comment on whether the ''fraudulent, manipulative or deceptive conduct'' determination should be considered and decided only by the relevant regulator issuing the final order. In particular, we asked whether ''fraudulent, manipulative or deceptive conduct'' should be understood to require knowing misconduct or scienter, and noted the concern expressed by some commenters that ''technical or administrative violations'' should not be a source of disqualification.[147]

Some commenters believed that the Commission should provide standards for fraudulent, manipulative or deceptive conduct to clarify and limit the types of orders by state and federal regulators that will trigger disqualification.[148] These commenters supported a definition that requires scienter, generally modeled on the scienter standards of Section 10(b) of the Exchange Act and Rule 10b–5.[149] Many of these commenters also argued that violations they characterized as ''technical'' or ''administrative,'' such as late filings and books and records violations, without a requirement of scienter, should not give rise to disqualification.[150] On the other hand, a commenter who opposed defining ''final order'' to include scienter pointed out that scienter is not required for all state securities law violations or for violations of federal banking regulations (where the standard is unsafe or unsound banking practices or breach of fiduciary duty), so limiting the definition of fraudulent, manipulative or deceptive conduct to scienter-based violations would potentially result in orders by those regulators not giving rise to disqualification even though they are explicitly mandated to be covered by Section 926. In the commenter's view, this would be contrary to Congressional

[141] Letter from SIFMA.

[142] *See* Rule 501.

[143] Letter from NYCBA

[144] Letters from C. Barnard; NYCBA; Rutledge.

[145] Letters from SIFMA; REISA; Alfaro.

[146] *See* Rule 501.

[147] *See* advance comment letter from Investment Program Association (Mar. 2, 2011) (available at *http://www.sec.gov/comments/df-title-ix/regulation-d-disqualification/regulationddisqualification-3.pdf*). *See also* Record of Proceedings of 29th Annual SEC Government-Business Forum on Small Business Capital Formation, at 18 (Nov. 18, 2010) (remarks of Deborah Froling) (available at *http://www.sec.gov/info/smallbus/sbforumtrans-111810.pdf*).

[148] *See* comment letters from Alfaro; ABA Fed. Reg. Comm.; Five Firms; the Managed Funds Association (Aug. 12, 2011) (''MFA''); NYCBA; REISA; SIFMA; S&C; Whitaker Chalk.

[149] *See* comment letters from ABA Fed. Reg. Comm.; Five Firms; MFA; NYCBA; REISA; SIFMA; S&C; Whitaker Chalk. *See also* comment letter from Cleary Gottlieb (supporting a scienter requirement for all regulatory orders, including orders of the Commission, with an exception for Commission orders related to violations of Section 5 of the Securities Act).

[150] *See, e.g.,* comment letters from Five Firms; MFA; SIFMA.

intent and the plain language of Section 926.[151]

We do not believe that Section 926(A)(ii) is limited to matters involving scienter. Scienter is not a requirement under Section 15(b)(4)(H) of the Exchange Act or Section 203(e)(9) of the Advisers Act, from which the language of Section 926 is drawn. Commission orders are issued under these sections based only on the existence of a relevant state or federal regulatory order; the Commission has stated that, while the degree of scienter involved is a factor in determining what sanction is appropriate,[152] the Commission can order sanctions even where scienter is not an element of the underlying state anti-fraud law violation.[153] Scienter may also not play a similar role in other areas of regulation specified in Section 926(A)(ii), such as insurance, banking and credit union regulation, as it does under the federal securities laws. We do not believe it is appropriate to limit the provision to matters involving scienter absent a clear statutory direction to do so, particularly when the relevant language has been construed in other contexts not to be so limited, and when imposing such a limitation may result in excluding regulatory orders that are explicitly mandated to be covered by the new rules. Accordingly, the final rules do not include a definition of ''fraudulent, manipulative or deceptive conduct'' and in particular do not limit ''fraudulent, manipulative or deceptive conduct'' to matters involving scienter.

Final Rule. As adopted, Rule 506(d)(1)(iii) provides that disqualification will arise if a covered person is subject to a final order of a state securities commission (or an agency or officer of a state performing like functions); a state authority that supervises or examines banks, savings associations, or credit unions; a state insurance commission (or an agency or officer of a state performing like functions); an appropriate federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:

- At the time of the sale, bars the person from association with an entity regulated by such commission, authority, agency, or officer; engaging in the business of securities, insurance or banking; or engaging in savings association or credit union activities; or
- Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before the sale.[154]

4. Commission Disciplinary Orders

Rule 262(b)(3) of Regulation A imposes disqualification on an issuer if any covered person is subject to an order of the Commission ''entered pursuant to section 15(b), 15B(a), or 15B(c) of the Exchange Act, or section 203(e) or (f) of the Investment Advisers Act.'' [155] Under these provisions (other than Section 15B(a), discussed below), the Commission has authority to order a variety of sanctions against registered brokers, dealers, municipal securities dealers and investment advisers and their associated persons, including suspension or revocation of registration, censure, placing limitations on their activities, imposing civil money penalties and barring individuals from being associated with specified entities and from participating in the offering of any penny stock.

Our proposed rule was based on Rule 262(b)(3), but eliminated the anomalous reference to Section 15B(a), which is not a source of sanctioning authority, and codified the prior interpretive position that disqualification would continue only for as long as some act is prohibited or required to be performed pursuant to the order (with the consequence that censures and orders to pay civil money penalties, assuming the penalties are paid in accordance with the order, are not disqualifying, and a disqualification based on a suspension or limitation of activities expires when the suspension or limitation expires).[156] Under the proposed rule, an offering would be disqualified if any covered person is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Exchange Act or section 203(e) or (f) of the Advisers Act that, at the time of such sale, suspends or revokes such person's registration as a broker, dealer, municipal securities dealer or investment adviser; places limitations on the activities, functions or operations of such person; or bars such person from being associated with any entity or from participating in the offering of any penny stock.[157]

We requested comment on the appropriateness of codifying the interpretive position and imposing any look-back period for Commission disciplinary sanctions. Specifically, we requested comment on whether the rules should provide that orders to pay civil money penalties are disqualifying if the penalties are not paid as ordered. The proposal drew relatively little comment, all of which was supportive.[158] We are adopting the rule as proposed, now numbered Rule 506(d)(1)(iv).

5. Certain Commission Cease-and-Desist Orders

Section 926 of the Dodd-Frank Act mandates that bad actor disqualification result from final orders issued within a ten-year period by the state and federal regulators identified in Section 926(2)(A) of the Dodd-Frank Act. The state and federal regulators listed in Section 926 include: State authorities that supervise banks, savings associations, or credit unions; state insurance regulators; appropriate federal banking agencies; and the National Credit Union Administration. The Commission is not included in the Section 926(2)(A) list of regulators. Although we did not propose specific amendments to the rule to include the Commission, we explained that adding the Commission's cease-and–desist orders to the disqualification provisions could further enhance the investor protection intent of the disqualification provisions and would contribute to creating an internally consistent set of rules that would treat relevant sanctions

[151] *See* comment letter from Rutledge.

[152] *Steadman* v. *SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds,* 450 U.S. 91 (1981).

[153] *See In the Matter of Mitchell M. Maynard and Dorice A. Maynard,* Release No. IA–2875 (May 15, 2009).

[154] Rule 506(d)(1)(iii).

[155] 17 CFR 230.262(b)(3) (citing 15 U.S.C. 78o(f), 78o(4)(a), 78o(4)(c), 80b–3(e) and 80b–3(f)). Section 21B(a) of the Exchange Act, 15 U.S.C. 78u–2(a)(1), and Section 203(i)(1)(A) of the Advisers Act, 15 U.S.C. 80b–3(i)(1)(A), give the Commission authority to impose civil money penalties in these disciplinary proceedings.

[156] *See* Proposed Rule 506(c)(1)(iv); Release No. 33–6289 (Feb. 13, 1981) [46 FR 13505, 13506 (Feb. 23, 1981)] (in adopting amendments to Rule 252 of Regulation A, the predecessor to Rule 262, the Commission noted ''[i]n those instances where persons are subject to orders containing no definite time limitations, the Commission has consistently taken the position that a person is subject to an order only so long as some act is being performed pursuant to such order, [such as] establishing procedures to assure appropriate supervision of salesmen and reporting on such procedures.'') The staff of the Division of Corporation Finance has taken the same view. *See* Release No. 33–6455, Question 66 (Mar. 3, 1983) [48 FR 10045, 10053 (Mar. 10, 1983)] (in interpretive release on Regulation D, the staff advised that censure has no continuing force and thus censured person is not ''subject to an order of the Commission entered pursuant to section 15(b)'' within the meaning of Rule 505); Howard, Prim, Rice, Nemerovski, Canady & Pollak, SEC No-Action Letter, 1975 WL 11300 (Jan. 8, 1975, publicly available Feb. 11, 1975) (Rule 252 does not comprehend a situation where an underwriter of a Regulation A offering has stipulated to a consent order in a Commission administrative proceeding providing only for a censure, with no suspension or other sanction); Samuel Beck, SEC No-Action Letter, 1975 WL 11471 (May 15, 1975, publicly available June 24, 1975).

[157] Proposed Rule 506(c)(iv).

[158] *See* comment letter from Rutledge; *see also* comment letters from Lehman & Eilen; SIFMA.

similarly for disqualification purposes. In the proposing release, we pointed out in particular that orders issued in stand-alone Commission cease-and-desist proceedings [159] are not disqualifying under current bad actor disqualification provisions,[160] and the proposal did not include such orders as disqualifying for purposes of Rule 506 offerings.

Our request for comment covered a range of issues, including whether it was appropriate to include the Commission in the list of regulators and if so, what types of Commission cease-and-desist orders should give rise to Rule 506 disqualification. In the proposing release, we presented possible approaches to including Commission orders as a disqualifying event and requested comment on those approaches. We requested comment on whether it would be appropriate to include cease-and-desist orders issued by the Commission for violations of the anti-fraud provisions of the federal securities laws, and whether requiring scienter and including cease-and-desist orders related to violations of Section 5 of the Securities Act would be appropriate. Given that Rule 506 offerings provide an exemption from Section 5 registration, we noted that on that basis, persons who violate Section 5 should potentially lose the benefit of exemptive relief for some period afterward.

The request for comment generated a substantial response. Five comment letters favored covering all Commission orders, including cease-and-desist orders (subject in some cases to a scienter requirement).[161] One comment letter noted that although including Commission cease-and-desist orders could impair capital formation, the benefits of doing so would outweigh the risks because adding Commission orders would more effectively work to screen out bad actors and improve internal consistency of the rules.[162] This comment letter described the proposed rule and the absence of Commission orders as ''under-inclusive'' because the proposed amendments did not explicitly address all final orders issued by the Commission addressing fraudulent, manipulative or deceptive conduct.

Five comment letters opposed adding Commission cease-and-desist orders, generally arguing that the Commission lacks authority to expand on the Section 926 statutory scheme in that way.[163] One comment letter suggested the decision to include cease-and-desist orders would add a large class of regular and routine disciplinary proceedings to the disqualification provisions, expressing concern that including administrative cease-and-desist orders that do not require any showing or finding of intentional misconduct could be viewed as unnecessarily punitive by disqualifying an organization from particular types of capital formation activity.[164] This comment letter also noted that including cease-and-desist orders marked a departure from the disciplinary order provisions of Rule 262(b)(3) in which the Commission has historically interpreted Rule 262 ''to require disqualification only for as long as some act is prohibited or required to be performed pursuant to the order.'' [165] Another comment letter stated that cease-and-desist orders should not create a disqualification unless it imposes a limitation or restriction on conduct.[166] One commenter also opposed adding Commission cease-and-desist orders based on the legislative history of Section 15(b)(4)(H) of the Exchange Act, from which the language used in Section 926 is drawn.[167]

We believe that including certain Commission cease-and-desist orders in the bad actor disqualification scheme would enhance its investor protection benefits and make the overall scheme of Rule 506 of Regulation D more internally consistent. We believe an injunctive or restraining order issued by a federal court and a Commission cease-and-desist order arising out of the same legal violation equally demonstrate disqualifying conduct and should have the same consequences under our disqualification rules. The benefits associated with screening bad actors out of the Rule 506 market should not depend on whether a particular enforcement action is brought in court or through a Commission cease-and-desist proceeding. For that reason, the final rules include a provision that makes certain Commission cease-and-desist orders a disqualifying event.

We disagree with the commenters who argue that the Commission lacks authority, as part of this rulemaking, to add additional disqualification triggers not provided in Section 926. In our view, Section 926 does not limit the existing authority we previously used to create other bad actor provisions.

In expanding the list of disqualification triggers beyond those required in Section 926, we are mindful of our mandate to promote investor protection and capital formation. In particular, we are mindful of the concerns expressed by commenters about the potentially negative impact on capital raising of overbroad disqualification standards.[168] The concerns associated with including Commission cease-and-desist orders involved expanding the class of covered persons subject to disqualification and including administrative cease-and-desist orders that do not require any showing or finding of scienter. With those issues in mind, the additional disqualification trigger we are adopting covers only Commission orders to cease and desist from violations and future violations of the scienter-based anti-fraud provisions of the federal securities laws (including, without limitation, Section 17(a)(1) of the Securities Act,[169] Section 10(b) of the Exchange Act [170] and Rule 10b–5 thereunder,[171] Section 15(c)(1) of the Exchange Act,[172] and Section 206(1) of the Advisers Act [173]) and violations of Section 5 of the Securities Act.[174] The additional disqualification trigger for Section 5 violations will not require scienter, which is consistent with the strict liability standard imposed by Section 5.[175] As a policy matter, we do not believe that exemptions from

[159] In cease-and-desist proceedings, the Commission can issue orders against ''any person,'' including entities and individuals outside the securities industry, imposing sanctions such as penalties, accounting and disgorgement or officer and director bars. In contrast, administrative proceedings are generally limited to regulated entities and their associated persons.

[160] Current provisions also do not cover other types of Commission actions. For example, the Commission has authority under Section 9(b) of the Investment Company Act to bring proceedings against ''any person'' and may impose investment company bars, civil penalties and disgorgement under Sections 9(d) and (e) of the Investment Company Act. 15 U.S.C. 80a–9(b), (d) and (e). The Commission also has authority under Rule 102(e) of its Rules of Practice to censure persons (such as accountants and attorneys) who appear or practice before it, or to deny them the privilege of appearing before the Commission temporarily or permanently. 17 CFR 201.102(e). Orders under these sections are not disqualifying under Rule 262.

[161] *See* comment letters from Better Markets; Cleary Gottlieb (scienter required except for Section 5 violations); NYCBA; NASAA; Whitaker Chalk (scienter required; suggesting that Commission list the violations that lead to disqualification or adopt a willful violation standard).

[162] *See* comment letter from Cleary Gottlieb.

[163] *See* comment letters from ABA Fed. Reg. Comm.; Five Firms; Katten Muchin; Rutledge; SIFMA.

[164] *See* comment letter from Five Firms.

[165] *Id.*

[166] *See* comment letter from SIFMA.

[167] *See* comment letter from Rutledge.

[168] *See* notes 296–98 and accompanying text.

[169] 15 U.S.C. 77q(a)(1).

[170] 15 U.S.C. 78j(b).

[171] 17 CFR 240.10b–5.

[172] 15 U.S.C. 78o(c)(1).

[173] 15 U.S.C. 80b–6(1).

[174] 15 U.S.C. 77e.

[175] *See SEC* v. *North American Research and Development Corp.*, 424 F.2d 63, 8182 (2d Cir. 1970); *Swenson*, 626 F.2d at 424 (5th); *SEC* v. *Ross*, 504 F.3d 1130, 1137 (9th Cir. 2007); *SEC* v. *Pearson*, 426 F.2d 1339, 1343 (10th Cir. 1970).

registration based on Rule 506 should be available to persons whose prior conduct has resulted in an order to cease and desist from violations of Section 5's registration requirements.

The additional disqualification trigger will be subject to the same five-year look-back period that applies to court restraining orders and injunctions,[176] rather than the 10-year look-back that is mandated to apply to other regulatory orders under Section 926, which will provide consistent Commission treatment of cease and desist orders with court orders.

As adopted, Rule 506(d)(1)(v) imposes disqualification if any covered person is subject to any order of the Commission entered within five years before such sale that, at the time of such sale, orders the person to cease and desist from committing or causing a violation or future violation of any scienter-based anti-fraud provision of the federal securities laws (including without limitation Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b–5 thereunder, Section 15(c)(1) of the Exchange Act and Section 206(1) of the Advisers Act, or any other rule or regulation thereunder) or Section 5 of the Securities Act.[177]

6. Suspension or Expulsion From SRO Membership or Association With an SRO Member

Rule 262(b)(4) disqualifies an offering if any covered person is suspended or expelled from membership in, or suspended or barred from association with a member of, a securities self-regulatory organization or ''SRO'' (*i.e.,* a registered national securities exchange or national securities association) for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade.[178] The proposed rule added a reference to a registered affiliated securities association and applied the standard to all covered persons,[179] but did not otherwise change the substance of the rule. Under the proposed rule, an offering would be disqualified if any covered person is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade.[180]

The proposal drew little comment,[181] and we are adopting the text of the rule as proposed. It is now numbered Rule 506(d)(1)(vi) because of the addition of the new provision covering certain Commission cease-and-desist orders in Rule 506(d)(1)(v).

7. Stop Orders and Orders Suspending the Regulation A Exemption

Paragraphs (a)(1) and (2) of Rule 262 impose disqualification on an offering if the issuer, or any predecessor or affiliated issuer, has filed a registration statement or Regulation A offering statement that was the subject of a Commission refusal order, stop order or order suspending the Regulation A exemption within the last five years, or is the subject of a pending proceeding to determine whether such an order should be issued.[182] Similarly, paragraphs (c)(1) and (2) impose disqualification if any underwriter of the securities proposed to be issued was, or was named as, an underwriter of securities under a registration statement or Regulation A offering statement that was the subject of a Commission refusal order, stop order or order suspending the Regulation A exemption within the last five years, or is the subject of a pending proceeding to determine whether such an order should be issued.[183] The proposed rule incorporated the substance of these four paragraphs in a single paragraph that applied to all covered persons. Under the proposed rule, an offering would be disqualified if any covered person has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or Regulation A offering statement filed with the Commission that, within five years before such sale, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such sale, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued.[184]

The proposal drew only one comment,[185] which supported the proposal, and we are adopting the text as proposed, now numbered Rule 506(d)(1)(vii).

8. U.S. Postal Service False Representation Orders

Paragraphs (a)(5) and (b)(5) of Rule 262 impose disqualification on an offering if the issuer or another covered person is subject to a U.S. Postal Service false representation order entered within the preceding five years, or to a temporary restraining order or preliminary injunction with respect to conduct alleged to have violated the false representation statute that applies to U.S. mail.[186] Our proposed rule incorporated the substance of these paragraphs in a single paragraph, disqualifying an offering if any covered person is subject to a United States Postal Service false representation order entered within five years before such sale, or is, at the time of such sale, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.[187] The proposal drew only one comment,[188] which supported the proposal, and we are adopting the text as proposed, now numbered Rule 506(d)(1)(viii).

D. Reasonable Care Exception

1. Reasonable Care Standard

The proposal included an exception from disqualification for offerings where the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed because of the presence or participation of another covered person.[189]

The proposal also included an instruction to the reasonable care exception explaining that an issuer would not be able to establish that it had exercised reasonable care unless it made a factual inquiry into whether any disqualifications existed. As proposed, the instruction noted that the nature and scope of the inquiry would vary based

[176] Rule 506(d)(1)(ii).

[177] Rule 506(d)(1)(v).

[178] *See* 17 CFR 230.262(b)(4).

[179] Proposed Rule 506(c)(1)(vi). Rule 262(b)(4) does not apply to issuers and their predecessors and affiliated issuers. 17 CFR 230.262(b)(4).

[180] Proposed Rule 501(c)(v).

[181] Three commenters responded to our request for comment on whether commodities exchanges and commodities self-regulatory organizations should be covered by the provision. One favored such an extension (comment letter from Better Markets) and two opposed it (comment letters from Lehman & Eilen, Rutledge). We have not included such an extension in the final rule.

[182] 17 CFR 230.262(a)(1) and (2).

[183] 17 CFR 230.262(c)(1) and (2).

[184] Proposed Rule 506(c)(1)(vi).

[185] *See* comment letter from Rutledge.

[186] Paragraph (a)(5) relates to issuers and their predecessors and affiliated issuers, and paragraph (b)(5) relates to other covered persons. Disqualification results if any covered person ''is subject to a United States Postal Service false representation order entered under 39 U.S.C. 3005 within 5 years prior to the filing of the offering statement, or is subject to a temporary restraining order or preliminary injunction entered under 39 U.S.C. 3007 with respect to conduct alleged to have violated 39 U.S.C. 3005.'' 17 CFR 230.262(a)(5) and (b)(5).

[187] Proposed Rule 506(c)(1)(vii)

[188] *See* comment letter from Rutledge.

[189] *See* Proposed Rule 506(c)(2)(ii).

on the circumstances of the issuer and the other offering participants. We proposed the reasonable care exception to preserve the intended benefits of Rule 506 and avoid creating an undue burden on capital-raising activities, by reducing the risk that issuers could lose the benefit of Rule 506 as a result of disqualifications of which they were unaware.[190]

The proposing release did not prescribe or delineate what steps an issuer would be required to take to show reasonable care. Rather, it noted that the steps an issuer would take would vary according to the circumstances of the covered persons and the offering, taking into account the risk of having a bad actor, the impact of other screening and compliance mechanisms already in place, and the cost and burden of the inquiry. We requested comment on the appropriateness of the reasonable care exception and whether the rule should specify what factual inquiry is required or provide examples of specific factual inquiries that would be deemed to constitute reasonable care. The proposing release also recognized that requiring large issuers or large financial institutions acting as compensated solicitors to conduct factual inquiries on potentially lengthy lists of officers could be burdensome, and therefore we requested comment on whether the rules should provide specific steps to establish reasonable care in these circumstances.

In the proposing release, we discussed the reasonable care exception in the NASAA-approved Model Accredited Investor Exemption (''MAIE''), which serves as a standard in blue sky law and has been adopted in some form by a majority of the states. The MAIE requires the issuer to conduct a ''factual inquiry'' before asserting the reasonable care exception but does not provide specific information on what steps are required for the factual inquiry. We also noted in the proposing release that, as part of the proposed amendments to Regulation D in 2007, the Commission proposed disqualification provisions that included a reasonable care exception based on the MAIE, without any express reference to factual inquiry.

The proposed reasonable care exception attempted to address the potential difficulty for issuers in establishing whether any covered persons are the subject of disqualifying events, particularly given that there is no central repository that aggregates information from all the federal and state courts and regulatory authorities that would be relevant in determining whether covered persons have a disqualifying event in their past. We believe such a reasonable care exception will facilitate the continued utility of Rule 506 in light of the new disqualification requirements.

Commenters who addressed the issue were unanimous in their support for a reasonable care exception.[191] Many, however, voiced concerns about the perceived vagueness of the proposed exception, and urged us to provide more guidance on what types of factual inquiry would constitute compliance.[192] Some commenters suggested that specific steps be presumed to establish reasonable care, such as obtaining questionnaires from appropriate persons (provided the issuer has no knowledge of undisclosed disqualifying events) [193] or use of a reputable background investigations firm.[194] Another suggested that issuers be permitted to rely on contractual representations from registered broker-dealers and other regulated entities, and that broker-dealers that adopt reasonable policies and procedures to identify disqualifications in respect of other offering participants should be presumed to satisfy the ''reasonable care'' test.[195] One commenter requested a cut-off date for the determination of bad actor involvement (*e.g.,* 15 days before commencement of the offering).[196] Three commenters who supported the reasonable care exception criticized the proposed factual inquiry requirement, suggesting it would impose undue burdens on issuers and recommending that we remove it from the adopted rule.[197] Another commenter suggested that the Commission look to the standards that were adopted by NASAA in the Uniform Limited Offering Exemption and endorsed by NASAA in the Uniform Securities Act, neither of which contains a factual inquiry component.[198]

Other commenters stressed the importance of conditioning the availability of the reasonable care exception on the issuer's factual inquiry.[199] These commenters viewed the factual inquiry as a way to ensure that investor protection is not compromised by issuers' taking minimal steps designed primarily to satisfy minimum requirements for the reasonable care standard rather than to ascertain whether disqualifications actually apply.[200]

We continue to believe that the concept of reasonable care necessarily includes inquiry by the issuer into the relevant facts, and we are adopting the provision and its accompanying instruction substantially as proposed.[201] There is a wide range of issuers involved in Rule 506 offerings, from large reporting companies, to private investment funds, to smaller private companies, all of which have different legal and ownership structures and may employ a wide range of financial intermediaries, in terms of size, number of employees and scope. As a result, we do not believe it is appropriate to prescribe specific steps as being necessary or sufficient to establish reasonable care.

Accordingly, as we stated in the proposing release, the steps an issuer should take to exercise reasonable care will vary according to the particular facts and circumstances. For example, we anticipate that issuers will have an in-depth knowledge of their own executive officers and other officers participating in securities offerings gained through the hiring process and in the course of the employment relationship, and in such circumstances,

[190] Rule 508 of Regulation D provides that ''insignificant deviations'' from the terms, conditions and requirements of Regulation D will not necessarily result in loss of the exemption from Securities Act registration requirements. Rule 508 provides that the exemption will not be lost with respect to any offer or sale to a particular individual or entity as a result of a failure to comply with a term, condition or requirement of Regulation D if the person relying on the exemption shows that: the failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity; the failure to comply was insignificant with respect to the offering as a whole (provided that certain Regulation D requirements, including limitations on general solicitation and any applicable limits on the amount of securities offered and the number of investors, are always deemed significant); and a good faith and reasonable attempt was made to comply. 17 CFR 230.508. We do not believe that Rule 508 would cover circumstances in which an offering was disqualified based on Rule 506(d).

[191] *See, e.g.,* comment letters from ABA Fed. Reg. Comm.; Angel Capital Association (July 14, 2011) (''Angel Capital Comment Letter 1''); Better Markets; DTC; Kutak Rock; Lehman & Eilen; NASAA; NYCBA; Rutledge; SIFMA; Seward & Kissel; S&C; S&W; Whitaker Chalk.

[192] *See, e.g.,* comment letters from ABA Fed. Reg. Comm.; Kutak Rock; NYCBA; S&C.

[193] *See* Angel Capital Comment Letter 1; *see also* comment letter from ABA Fed. Reg. Comm..

[194] *See* comment letter from S&W.

[195] *See* comment letter from NYCBA; *see also* comment letters from ABA Fed. Reg. Comm.; Angel Capital Comment Letter 1; Kutak Rock (issuers should be able to rely on registered broker-dealer's confirmation that no disqualification exists).

[196] *See* comment letter from Cleary Gottlieb.

[197] *See* Angel Capital Comment Letter 1; *see also* comment letters from Rutledge; S&C.

[198] Comment letter from Rutledge. The Uniform Limited Offering Exemption and the Uniform Securities Act provide exceptions from disqualification where the issuer shows that it did not know and in the exercise of reasonable care could not have known that a disqualification existed.

[199] *See* comment letters from Better Markets; NASAA.

[200] *E.g.,* comment letter from Better Markets.

[201] *See* Rule 506(d)(2)(iii) and instruction thereto.

further steps may not be required in connection with a particular offering. Factual inquiry by means of questionnaires or certifications, perhaps accompanied by contractual representations, covenants and undertakings, may be sufficient in some circumstances, particularly if there is no information or other indicators suggesting bad actor involvement.

The timeframe for inquiry should also be reasonable in relation to the circumstances of the offering and the participants. Consistent with this standard, the objective should be for the issuer to gather information that is complete and accurate as of the time of the relevant transactions, without imposing an unreasonable burden on the issuer or the other participants in the offering. With that in mind, we expect that issuers will determine the appropriate dates to make a factual inquiry, based upon the particular facts and circumstances of the offering and the participants involved, to determine whether any covered persons are subject to disqualification before seeking to rely on the Rule 506 exemption.

In general, issuers should make factual inquiry of the covered persons, but in some cases—for example, in the case of a registered broker-dealer acting as placement agent—it may be sufficient to make inquiry of an entity concerning the relevant set of covered officers and controlling persons, and to consult publicly available databases concerning the past disciplinary history of the relevant persons.[202] Broker-dealers are already required to obtain much of this information for their own compliance purposes. We anticipate that financial intermediaries and other market participants will develop procedures for assisting issuers in gathering the information necessary to satisfy the issuer's factual inquiry requirement.

If the circumstances give an issuer reason to question the veracity or accuracy of the responses to its inquiries, then reasonable care would require the issuer to take further steps or undertake additional inquiry to provide a reasonable level of assurance that no disqualifications apply.

2. Continuous and Long-Lived Offerings

Some commenters requested specific guidance from the Commission on factual inquiry procedures for continuous offerings such as those by hedge funds and some other pooled investment funds.[203] One commenter criticized the application of the factual inquiry requirement to offerings made on a continuous or delayed basis under Rule 506, arguing that reasonable factual inquiry for all covered persons could be interpreted to require continuous, real-time monitoring, which would be especially onerous for issuers in such offerings.[204] Others suggested permitting issuers to establish the reasonable care exception solely through an initial representation about the potential applicability of disqualifying events followed by subsequent periodic updates, such as annual negative consent letters relating to any changes to such representation on a basis consistent with FINRA Rules 5130 and 5131.[205]

We believe that for continuous, delayed or long-lived offerings, reasonable care includes updating the factual inquiry on a reasonable basis. Again, the frequency and degree of updating will depend on the circumstances of the issuer, the offering and the participants involved, but in the absence of facts indicating that closer monitoring would be required (for example, notice that a covered person is the subject of a judicial or regulatory proceeding or knowledge of weaknesses in an organization's screening procedures), we would expect that periodic updating could be sufficient. We expect that issuers will manage this through contractual covenants from covered persons to provide bring-down of representations, questionnaires and certifications, negative consent letters, periodic re-checking of public databases, and other steps, depending on the circumstances.

E. Waivers

Consistent with the requirement of Section 926 that the Commission promulgate disqualification provisions ''substantially similar'' to Regulation A, the proposal included a waiver provision based on current Rule 262, under which the Commission could grant a waiver of disqualification if it determined that the issuer had shown good cause ''that it is not necessary under the circumstances that the [registration] exemption . . . be denied.'' [206]

The proposing release requested comment on whether the proposed rule should include a provision such as in the one in the MAIE that provides an exception from disqualification if the state authority that issued the disqualifying order waives the disqualification. The proposing release also requested comment on whether the Commission should provide guidance as to the circumstances that would likely give rise to the grant or denial of a waiver and whether the Commission should exercise waiver authority for cases involving final orders of state regulators.

1. Waiver for Good Cause Shown

Under current rules, the Commission has delegated authority to grant disqualification waivers under Regulation A and Rule 505 to the Director of the Division of Corporation Finance.[207] Under the proposal, there would have been no delegation of authority for waivers of bad actor disqualification under the new Rule 506 disqualification provisions, and all such waivers would have been issued by a direct order of the Commission.

Commenters who addressed the issue were universally supportive of including a waiver provision in the bad actor disqualification provisions applicable to Rule 506.[208] We are adopting the waiver provision substantially as proposed, with the modifications discussed below.[209]

Given the expectation of a short time frame for many Rule 506 offerings, a number of commenters expressed concern over the timeliness of waiver application reviews by the Commission and the risk that a lengthy review process may disadvantage issuers seeking speedy access to capital.[210] Three commenters urged that authority be delegated to Commission staff to grant waivers, out of a concern for

[202] FINRA maintains BrokerCheck, an online tool that enables the public to check the professional backgrounds of current and former FINRA-registered brokerage firms and brokers, as well as investment adviser firms and representatives. The information included in BrokerCheck about brokers and brokerage firms is derived from the Central Registration Depository, the securities industry online registration and licensing database. The information about investment adviser firms and representatives made available through BrokerCheck is derived from the Commission's Investment Adviser Public Disclosure (IAPD) database.

[203] *See* comment letters from Lehman & Eilen; NYCBA; S&C.

[204] *See* comment letter from S&C.

[205] *See* comment letters from ABA Fed. Reg. Comm.; SIFMA; S&C; *see also* comment letter from NYCBA (semi-annual updates). FINRA Rules 5130 and 5131 permit reliance on written representations for up to 12 months, with annual negative consent letters thereafter, to confirm that accounts are not beneficially owned by certain ''restricted persons'' (Rule 5130) or by certain executive officers and directors or persons materially supported by them (Rule 5131).

[206] Proposed Rule 506(c)(2)(i).

[207] *See* 17 CFR 200.30–1(b), 200.30–1(c).

[208] *See* comment letters from ABA Fed. Reg. Comm.; Coy Capital; DTC; Five Firms; IPA; Katten Muchin; Lehman & Eilen Cotter; I. Linder (July 14, 2011); MFA; NYCBA; NASAA; REISA; Rutledge; SIFMA; Seward & Kissel; S&C; Whitaker Chalk.

[209] *See* Rule 506(d)(2)(ii).

[210] *See* comment letters from IPA; Seward & Kissel; Whitaker Chalk.

potential delays.[211] We are sensitive to concerns about delay in the waiver process, and believe that the staff has managed the process of granting waivers from Regulation A and Rule 505 disqualification appropriately in the past. Accordingly, we have determined to clarify the existing delegation of authority to the Director of the Division of Corporation Finance by amending it to cover waivers of Rule 506 disqualification.[212]

Several commenters requested clear guidance on circumstances that would give rise to the grant of a waiver from disqualification.[213] Three commenters argued that having clear disqualification waiver guidelines would result in greater efficiency for market participants and Commission staff, and encouraged the development of uniform standards that would prevent unfair application of the disqualification provisions.[214] We believe it would be premature to attempt to articulate standards for granting waivers, although we may consider doing so after we and the Commission staff have developed experience in handling waiver requests under the new Rule 506 disqualification rules. We have, nonetheless, identified in this adopting release a number of circumstances (such as a change of control, change of supervisory personnel, absence of notice and opportunity for hearing, and relief from a permanent bar for a person who does not intend to apply to reassociate with a regulated entity) that could, depending on the specific facts, be relevant to the evaluation of a waiver request. This is not an exhaustive list, and we expect that other factors would also be relevant to our consideration of waiver requests in particular cases.

2. Waiver Based on Determination of Issuing Authority

In response to our request for comment on how the Commission should handle waiver applications involving final orders of state regulators, three commenters recommended that the Commission retain its authority to waive disqualification arising out of such orders.[215] One commenter recommended that waivers should be permitted to be determined by the state or local authorities or the Commission, at the option of the issuer.[216] Several commenters recommended adoption of automatic exceptions from disqualification similar to those in the MAIE and Uniform Limited Offering Exemption (''ULOE'').[217] Under both the MAIE and ULOE, bad actor disqualification is waived if either (i) the person against whom an order is issued is licensed or regulated in the relevant state and is still permitted to conduct securities-related work in the state, or (ii) the regulator issuing the relevant order determines that disqualification is not necessary under the circumstances.[218] Another commenter recommended that the Commission not grant a waiver if such a grant would be prejudicial to an action by the state or regulator.[219]

We are persuaded that the second leg of the MAIE/ULOE exception to disqualification, under which disqualification does not apply if the regulator issuing the relevant order determines that Rule 506 disqualification is not necessary under the circumstances, strikes an appropriate balance. It allows the relevant authorities to determine the impact of their orders and conserves Commission resources (which might otherwise be devoted to consideration of waiver applications) in cases where the relevant authority determines that disqualification from Rule 506 offerings is not warranted. Accordingly, the final rule contains a provision based on MAIE paragraph (D)(2)(b), under which disqualification will not arise if, before the relevant sale is made in reliance on Rule 506, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing, whether in the relevant judgment, order or decree or separately to the Commission or its staff, that disqualification under Rule 506 should not arise as a consequence of such order, judgment or decree.[220] Because disqualification will not arise in those circumstances, no waiver need be sought from the Commission for a person subject to such an order, judgment or decree to participate in a Rule 506 offering. Even in the absence of such advice, however, the Commission may still exercise its discretion to grant waivers under Rule 506(d)(2)(ii) in cases where it considers it appropriate to do so.[221]

We are not, however, including a provision based on the first leg of the MAIE/ULOE test, which prevents disqualification if the triggering event occurs with respect to a regulated person, such as a broker-dealer, and such person continues to be licensed or registered to conduct securities-related business in the relevant state. As a practical matter, this approach eliminates from the MAIE/ULOE disqualification scheme all orders that are not bars or revocation of registration or licensure. We believe such an approach would be incompatible with the language of Section 926, which, by its terms, covers both bars and other final orders. For that reason, we have not adopted it. We may, however, take the fact that registration or licensure has not been suspended or revoked into account when considering waiver applications.

F. Transition Issues

1. Disqualification Applies Only to Triggering Events That Occur After Effectiveness of the Rule Amendments

Under the proposal, the new disqualification provisions would have applied to all sales made under Rule 506 after the effective date of the rule amendments. Offerings made after the effective date would have been subject to disqualification for all disqualifying events that occurred within the relevant look-back periods, regardless of whether the events occurred before enactment of the Dodd-Frank Act, or the proposal or effectiveness of the amendments to Rule 506.

We requested comment on this approach, both in broad terms and as to specific aspects, such as whether we should make special provision for orders issued in the context of negotiated settlements and whether we should provide for extensions of waivers granted with respect to bad actor disqualification under Regulation A, Rule 505 of Regulation D or

[211] *See* comment letters from ABA Fed. Reg. Comm.; MFA; Seward & Kissel.

[212] *See* 17 CFR 200.30–1(c).

[213] *See* comment letters from ABA Fed. Reg. Comm.; DTC; Lehman & Eilen; MFA; Rutledge; Whitaker Chalk.

[214] *See* comment letters from ABA Fed. Reg. Comm.; MFA; Rutledge.

[215] *See* comment letters from ABA Fed. Reg. Comm.; Coy Capital; NYCBA.

[216] *See* comment letter from REISA.

[217] *See* comment letters from ABA Fed. Reg. Comm.; Five Firms; IPA; I. Linder; Rutledge; SIFMA; Whitaker Chalk; *see also* comment letter from NYCBA. The Uniform Limited Offering Exemption was adopted by NASAA in 1983 and again in 1989. It is designed to provide a state-level exemption for offerings that are exempt from registration at the federal level under Rule 505 of Regulation D. Peter M. Fass and Derek A. Wittner, *Blue Sky Practice for Public and Private Direct Participation Offerings,* § 9.19 and Appendix 9A (Thomson Reuters/West 2008).

[218] *See* MAIE paragraphs (D)(2)(a)–(b) (available at *http://www.nasaa.org/wp-content/uploads/2011/07/24-Model_Accredited_Investor_Exemption.pdf*) *and* Fass and Wittner, note 205, at Appendix 9A, paragraph B.6.

[219] *See* comment letter from NASAA.

[220] *See* Rule 506(d)(2).

[221] Conversely, in cases where disqualification does not arise on the basis of an order, judgment or decree because the issuing authority advises that it should not, the Commission would not be precluded from pursuing its own enforcement action, which may result in a court order or judgment or a Commission order that constitutes an independent basis for disqualification.

Regulation E, so they would apply to Rule 506 disqualification as well. This section of the proposing release drew more comment than any other.

Five commenters supported including prior bad actor disqualifying events in the disqualification provisions, generally arguing, on investor protection grounds, that the purpose of the rule is to prevent all bad actors from participating in Rule 506 offerings.[222] For example, one such commenter asserted, ''[a]s between issuers and investors, it is far preferable that issuers face the delays or inconvenience necessary to cure disqualifications or register their offerings than for investors to be victimized by an issuer or promoter that was demonstrably unfit to invoke the Rule 506 exemption.'' [223] One commenter argued that contested proceedings should not be grandfathered because in those cases the respondent had no choice in the ultimate result of the proceeding.[224]

On the other hand, 15 comment letters requested that the Commission not apply the rules to past triggering events, or else provide for widespread grandfathering.[225] Critics of applying the rules to past events objected on the basis of statutory construction,[226] the Supreme Court decision in *Landgraf* v. *USI Film Products,*[227] and Congressional intent.[228] Many commenters also argued that such application of the new disqualification rules would unfairly upset previously negotiated civil and administrative settlements, or impose an unforeseeable new sanction in respect of prior conduct.[229] Several commenters recommended providing automatic waivers for settlements, or automatic extension of existing Regulation A and Rule 505 waivers if the new rules were to be applied to pre-existing events.[230] Another commenter argued that prospective application of disqualification provisions would be consistent with the Commission's approach to analogous bad actor disqualification provisions in the past, such as the ''ineligible issuer'' provisions of the Securities Offering Reform rule adopted in 2005 and the disqualification provisions adopted under the Private Securities Litigation Reform Act of 1995.[231]

In light of the views expressed by commenters, including concerns about potential unfairness, we have determined not to trigger Rule 506 disqualification on the basis of preexisting events. Accordingly, the amendments we are adopting today include a provision specifying that disqualification will not arise as a result of triggering events that occurred before the effective date of the rule amendments.[232] We will, however, require disclosure to investors regarding such events.

2. Mandatory Disclosure of Triggering Events That Pre-Date Effectiveness of the Rule Amendments

In the proposing release, we solicited comment on whether we should require disclosure, rather than disqualification, for bad actor triggering events that occurred before the effective date of the new rules. Several commenters were supportive.[233] One commenter viewed the disclosure requirement favorably as a way to balance fairness to issuers and other covered persons with the need for investor protection without impairing the effectiveness of the rule.[234] This commenter noted that any negative impact associated with applying disqualification only to events occurring after the effective date of the rule amendments would be ameliorated by requiring disclosure to investors of the existence of the event. Another commenter viewed disclosure as an appropriate method of dealing with past orders or convictions rather than imposing automatic disqualification since issuers would be unable to revisit the disqualifying conduct and alter the collateral consequences of those past convictions and orders as a result of the new disqualifying provisions.[235] In addition, one commenter argued more generally that the disqualification rules should be broadly reconsidered and a disclosure-based approach adopted instead.[236]

In lieu of imposing disqualification for pre-existing triggering events, the rule amendments require written disclosure of matters that would have triggered disqualification, except that they occurred before the effective date of the new disqualification provisions.[237] In light of Congress' concerns about the participation of certain felons and other bad actors in Rule 506 offerings, we believe this disclosure is important to put investors on notice of bad actor involvement in Rule 506 offerings that they are evaluating as potential investments. We believe this is particularly important after adoption of the new bad actor disqualification requirements for Rule 506 offerings because, as a result of the adoption of the new requirements implementing Section 926, investors may have the impression that all bad actors are now disqualified from participation in Rule 506 offerings. We expect that issuers will give reasonable prominence to the disclosure to ensure that information about pre-existing bad actor events is appropriately presented in the total mix of information available to investors.

The disclosure requirement in new Rule 506(e) will apply to all offerings under Rule 506, regardless of whether purchasers are accredited investors. Issuers will be required to provide disclosure ''a reasonable time prior to sale,'' which is the same timing that currently applies to disclosures to non-accredited investors under Rule 502(b)(1).[238]

If disclosure is required and not adequately provided to an investor, we do not believe that relief will be available under Rule 508, under which ''insignificant deviations'' from Regulation D requirements do not necessarily result in loss of the Securities Act exemption with regard to an offer or sale of securities to a particular individual or entity.[239] For Rule 508 to apply to an offer or sale of securities, the failure to comply with a Regulation D requirement must not pertain to a term, condition or requirement directly intended to protect that offeree or purchaser.[240] Disclosure of pre-existing triggering events under

[222] *See* comment letters from Anonymous (July 12, 2011); Better Markets; J. Davis (June 13, 2011); DTC; NASAA.

[223] *See* comment letter from Better Markets.

[224] *See* comment letter from Lehman & Eilen.

[225] *See* comment letters from Alfaro; ABA Fed. Reg. Comm.; Cleary Gottlieb; Coy Capital; Five Firms; IPA; Katten Muchin; Munck Carter; NYCBA; REISA; Rutledge; Seward & Kissel; SIFMA; S&C; Whitaker Chalk.

[226] *See* comment letters from ABA Fed. Reg. Comm.; Coy Capital; Five Firms; MFA; NYCBA; S&C.

[227] *See* comment letters from ABA Fed. Reg. Comm.; Coy Capital; Five Firms.

[228] *See* comment letters from Five Firms; MFA.

[229] *See* comment letters from ABA Fed. Reg. Comm.; Coy Capital; IPA; Lehman & Eilen; MFA; Munck Carter; REISA; Rutledge; SIFMA; Whitaker Chalk.

[230] *See* comment letters from ABA Fed. Reg. Comm.; Cleary Gottlieb; Five Firms; Rutledge; S&C.

[231] *See* comment letter from ABA Fed. Reg. Comm.

[232] *See* Rule 506(d)(2)(i). The rule looks to the timing of the triggering event (*e.g.,* a criminal conviction or court or regulatory order) and not the timing of the underlying conduct. A triggering event that occurs after effectiveness of the rule amendments will result in disqualification, even if the underlying conduct occurred before effectiveness.

[233] *See* comment letters from Lehman & Eilen; Munck Carter; REISA.

[234] *See* comment letter from Munck Carter.

[235] *See* comment letter from REISA.

[236] *See* comment letter from ABA Fed. Reg. Comm.

[237] *See* Rule 506(e).

[238] 17 CFR 230.502(b)(1).

[239] *See* note 190.

[240] *See* 17 CFR 230.508(a)(1).

new Rule 506(e) is intended to benefit all investors by alerting them to any bad actors associated with the issuer or the offering, and, therefore, this condition of Rule 508 cannot be met where the required disclosure is not provided.

Rule 506(e) does, however, provide that the failure to furnish required disclosure on a timely basis will not prevent an issuer from relying on Rule 506 if the issuer establishes that it did not know, and in the exercise of reasonable care could not have known, of the existence of the undisclosed matter or matters. This ''reasonable care'' exception to the disclosure requirement is similar to the ''reasonable care'' exception to disqualification we are also adopting today, and will preserve an issuer's claim to reliance on Rule 506 if disclosure is required but the issuer can establish that it did not know and in the exercise of reasonable care could not have known of the matters required to be disclosed. The provision also includes an instruction, similar to the instruction to Rule 506(d)(2)(iv), clarifying that reasonable care requires factual inquiry.

3. Timing of Implementation

Under our proposal, the new bad actor disqualification rules would have been implemented without any deferral period. We solicited comment on whether deferral would be appropriate. While two commenters opposed any delayed implementation, citing investor protection concerns,[241] several others urged us to implement the rules on a delayed basis to permit issuers to put compliance procedures in place and allow time for obtaining any necessary waivers.[242]

As adopted, the bad actor disqualification provisions of Rule 506(d) will take effect 60 days after publication in the **Federal Register**, without any additional deferral period. We concluded that an additional deferral is not necessary or appropriate since disqualification will not be imposed in respect of pre-existing triggering events so, although issuers and other offering participants will need to make reasonable factual inquiries during this 60-day period, no additional time is needed for waivers to be sought in respect of such events. Accordingly, the new disqualification provisions of Rule 506(d) and the mandatory disclosure provision of Rule 506(e) will apply to each sale of securities made in reliance on Rule 506 after the rule amendments go into effect.

As we discussed in the proposing release, sales of securities made before the applicable effective dates will not be affected by any disqualification or disclosure requirement, even if such sales are part of an offering that continues after the relevant effective date. Only sales made after the effective date of the amendments will be subject to disqualification and mandatory disclosure.

Disqualifying events that occur while an offering is underway will be treated in a similar fashion. Sales made before the occurrence of the disqualification trigger will not be affected by it, but sales made afterward will not be entitled to rely on Rule 506 unless the disqualification is waived or removed, or, if the issuer is not aware of a triggering event, the issuer can rely on the reasonable care exception.[243]

This approach is consistent with our other rules and we believe provides appropriate incentives to issuers and other covered persons. We solicited comment on other possible approaches, including not applying the new rules to offerings that are underway at the time of effectiveness of the new disqualification provisions. Several commenters supported complete or partial grandfathering for offerings that are underway at the time of effectiveness.[244] We do not think such grandfathering would be necessary, given that pre-existing events will give rise only to a disclosure requirement and not to disqualification. Further, some ongoing offerings could continue for years after the rule amendments take effect. We do not believe it would be appropriate to implement Section 926 in a way that would exempt such offerings on a long-term basis. Issuers should be able to make reasonable factual inquiries and prepare any necessary disclosures during the 60 days before the rules become effective.

G. Amendment to Form D

We are adopting as proposed the conforming amendment to Form D. Under the amendment, the signature block of the Form D will contain a certification, similar to the current certification by Rule 505 issuers, whereby issuers claiming a Rule 506 exemption will confirm that the offering is not disqualified from reliance on Rule 506 for one of the reasons stated in Rule 506(d).

III. Paperwork Reduction Act

A. Background

The mandatory disclosure provisions required under the final rules contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[245] The title for the collection of information is:

• ''Regulation D Rule 506(e) Felons and Other Bad Actors Disclosure Statement.'' We are requesting comment on the collection of information requirements in this adopting release, and are submitting these requirements to the Office of Management and Budget (''OMB'') for review in accordance with the PRA and its implementing regulations.[246] We are applying for an OMB control number for the proposed new collection of information in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13, and OMB has not yet assigned a control number to the new collection. Responses to the new collection of information would be mandatory. 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.

As adopted, the amendments to Rule 506 require that the issuer furnish to each purchaser, a reasonable time prior to sale, a written description of any matters that occurred before effectiveness of the final amendments and within the time periods described in the list of disqualification events set forth in Rule 506(d)(1) of Regulation D, in regard to the issuer or any other ''covered person'' associated with the offering. For purposes of the mandatory disclosure provision of Rule 506(e), issuers will be required to ascertain whether any disclosures are required in respect of covered persons involved in their offerings, prepare any required disclosures and furnish them to purchasers.

The Commission adopted the Regulation D Rule 506(e) Felons and Other Bad Actors Disclosure Statement under the Securities Act. The Regulation D Rule 506(e) Felons and Other Bad Actors Disclosure Statement required to be furnished to investors does not involve submission of a form

[241] *See* comment letters from DTC; NASAA.

[242] *See, e.g.,* comment letters from ABA Fed. Reg. Comm.; Five Firms; Kutak Rock; NYCBA; SIFMA.

[243] Disqualifying events that exist at the time the offering is commenced but are only discovered later will be disqualifying, and the sales will not be eligible for reliance on Rule 506, subject to the application of the reasonable care exception.

[244] *See* comment letters from Katten Muchin; Whitaker Chalk; Coy Capital; Rutledge.

[245] 44 U.S.C. 3501 *et seq.*

[246] In the proposing release, we did not submit a PRA analysis because we did not propose mandatory disclosure of past disqualifying events. At this time, we do not have any comments regarding overall burden estimates for the rule amendments. This release is requesting such comments.

filed with the Commission and is not required to be presented in any particular format, although it must be in writing. The hours and costs associated with preparing and furnishing the Regulation D Rule 506(e) Felons and Other Bad Actors Disclosure Statement to investors in the offering constitute reporting and cost burdens imposed by the collection of information. 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 disclosure or paperwork burden imposed on issuers appears in Rule 506(e) and pertains to events that occurred before effectiveness of the final rules but which would have triggered disqualification had they occurred after effectiveness. Issuers relying on Rule 506 must furnish disclosure of any relevant past events listed in Rule 506(e) that relate to the issuer or any other covered person. If there are any such events, a disclosure statement is required to be furnished, a reasonable time before sale, to all purchasers in the offering. The disclosure requirement serves to protect purchasers by ensuring that they receive information regarding any covered persons that were subject to such disqualifying events.

The disclosure requirement does not apply to triggering events occurring after the effective date of the rule amendments adopted today, because those events will result in disqualification from reliance on Rule 506 (absent a waiver or other exception provided in Rule 506(d)), rather than any disclosure obligation.

The steps that issuers will take to comply with the disclosure requirement are expected to mirror the steps they take to determine whether they are disqualified from relying on Rule 506. We expect that issuers planning or conducting a Rule 506 offering will undertake a factual inquiry to determine whether they are subject to any disqualification. Disqualification and mandatory disclosure are triggered by the same types of events in respect of the same covered persons, with disqualification arising from triggering events occurring after these rules take effect and mandatory disclosure applicable to events occurring before that date. Therefore, we expect that factual inquiry into potential disqualification can simply be extended to cover the period before the rules become effective. On that basis, we expect that the factual inquiry process for the disclosure statement requirement will impose a limited incremental burden on issuers.

As stated earlier, we expect that the size of the issuer and the circumstances of the particular Rule 506 offering will determine the scope of the factual inquiry and require tailored and offering-specific data gathering approaches. It should not generally be necessary for any issuer or any compensated solicitor to make inquiry of any covered individual with respect to ascertaining the existence of events that require disclosure more than once, because the period to be covered by the inquiry ends with the effective date of the new disqualification rules (so future events are unlikely to affect the inquiry or change the disclosures that have to be made). We do, however, expect that issuers may be required to revise their factual inquiry for each Rule 506 offering due to changes in management or intermediaries, other changes to the group of covered persons or if questions arise about the accuracy of previous responses. We also expect that the disclosure requirement may serve the additional function of helping issuers develop processes and procedures for the factual inquiry required to establish reasonable care under the disqualification provisions of Rule 506(d), which will be effective prospectively.

B. Burden and Cost Estimates Related to the Adopted Amendments

We anticipate that the disclosure requirement will result in an incremental increase in the burdens and costs for issuers that rely on the Rule 506 exemption by requiring these issuers to conduct factual inquiries into the backgrounds of covered persons with regard to events that occurred before effectiveness of the final bad actor disqualification rules. For purposes of the PRA, we estimate the total annual increase in paperwork burden for all affected Rule 506 issuers to comply with our proposed collection of information requirements to be approximately 22,108 hours of company personnel time and approximately $264,000 for the services of outside professionals. These estimates include the incremental time and cost of conducting a factual inquiry to determine whether the Rule 506 issuers have any covered persons with past disqualifying events. The estimates also include the cost of preparing a disclosure statement that issuers are required to furnish to each purchaser a reasonable time prior to sale.[247]

In deriving our estimates, we assume that:

- Approximately 19,908 Rule 506 issuers[248] relying on Rule 506 of Regulation D will spend on average one additional hour to conduct a factual inquiry to determine whether any covered persons had a disqualifying event that occurred before the effective date of the rule amendments; and
- On the basis of the factual inquiry, approximately 220[249] Rule 506 issuers will spend ten hours to prepare a disclosure statement describing matters that would have triggered disqualification under Rule 506(d)(1) of Regulation D had they occurred on or after the effective date of the rule amendments; and
- For purposes of the disclosure statement, 220 Rule 506 issuers will retain outside professional firms to spend three hours on disclosure preparation at an average cost of $400 per hour.

The increase in burdens and costs associated with conducting the factual

[247] 17 CFR 230.502(b)(2)(iii).

[248] Filing data reviewed by the staff of the Commission's Division of Economic and Risk Analysis indicate that for 2012, 15,028 issuers claiming the Rule 506 exemption filed one Form D and 1,250 such issuers filed more than one Form D. For purposes of the PRA estimates, we assume that all initial filers and approximately one quarter of repeat filers will conduct a factual inquiry, with the remaining repeat filers relying on prior factual inquiries. There is evidence that some issuers are not filing Form D for their offerings in compliance with Rule 503 as discussed in Part IX.B.4.a. of *Amendments to Regulation D, Form D and Rule 156 under the Securities Act,* Proposing Release No. 33–9416, (July 10, 2013). In addition, we estimate that the amendments to Rule 506(c) adopted today will result in a 20% increase in Form D filings relying on the Rule 506(c) exemption. *See Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings,* Adopting Release No. 33–9415, Part V.B. (July 10, 2013). For purposes of our PRA estimates, we have assumed that the estimated 20% increase in the number of Form D filings corresponds to a 20% increase in the number of issuers that will need to conduct a factual inquiry to determine whether a disclosure statement is necessary.

[249] Staff estimates that there were at least 549 SEC enforcement cases involving an unregistered offering in which someone who would be disqualified as a bad actor participated in the five years from 2007 through 2011, *see* Part IV.B.3, or at least 110 such offerings per year. This is a lower bound estimate based on a review of triggering events arising from Commission action only, and not other triggering events such as criminal convictions and state regulatory action. For purposes of the Paperwork Reduction Act analysis, we are doubling the number of Rule 506 offerings estimated to involve a bad actor, to account for such other triggering events. We are not aware of any database that would allow us to estimate with precision the number of other triggering events or the number of additional bad actors associated with them. Some data on state enforcement actions indicate that there would be a substantial number of other triggering events (*see, e.g.,* NASAA's 2012 Enforcement Report, discussed at text accompanying note 283); however, the data do not allow us to determine how many state enforcement actions are unique, as more than one state may take regulatory action against the same person and some state actions may overlap with Commission actions.

inquiry for the disclosure statement requirement should pose a minimal incremental effort given that issuers are simultaneously required to conduct a similar factual inquiry for purposes of determining disqualification from the Rule 506 exemption.

It is difficult to provide any standardized estimates of the costs involved with the factual inquiry. There is no central repository that aggregates information from all federal and state courts and regulators that would be relevant in determining whether a covered person has a disqualifying event in his or her past. In this regard, we are currently unable to accurately estimate the burdens and costs for issuers in a verifiable way. We expect, however, that the costs to issuers may be higher or lower depending on the size of the issuer and the number and roles of covered persons. We realize there may be a wide range of issuer size, management structure, and offering participants involved in Rule 506 offerings and that different issuers may develop a variety of different factual inquiry procedures.

Where the issuer or any covered person is subject to an event listed in Rule 506(e) existing before the effective date of these rules, the issuer will be required to prepare disclosure for each relevant Rule 506 offering. The estimates include the time and the cost of data gathering systems, the time and cost of preparing and reviewing disclosure by in-house and outside counsel and executive officers, and the time and cost of delivering or furnishing documents and retaining records.

Issuers conducting ongoing or continuous offerings will be required to update their factual inquiry and disclosure as necessary to address additional covered persons. The annual incremental paperwork burden, therefore, depends on an issuer's Rule 506 offering activity and the changes in covered persons from offering to offering. For example, some issuers may only conduct one Rule 506 offering during a year while other issuers may have multiple, separate Rule 506 offerings during the course of the same year involving different financial intermediaries, may hire new executive officers or may have new 20% shareholders, any of which will result in a different group of covered persons. In deriving our estimates, we recognize that the burdens will likely vary among individual companies based on a number of factors, including the size and complexity of their organizations. We believe that some companies will experience costs in excess of this estimated average and some companies may experience less than the estimated average costs.

Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Evaluate the accuracy of our estimate of the burden of the proposed collections of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments will have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who wish to submit comments on the collection of information requirements should direct their comments to OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503 and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090, with reference to File No. S7–31–10. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7–31–10 and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street NE., Washington, DC 20549–0213. Because OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if OMB receives them within 30 days of publication.

IV. Economic Analysis

A. Background and Summary of the Rule Amendments

As discussed above, we are adopting amendments to implement the requirements of Section 926 of the Dodd-Frank Act, relating to the disqualification of ''felons and other 'bad actors' '' from participation in Rule 506 offerings. Section 926 of the Dodd-Frank Act requires the Commission to issue rules that disqualify issuers making securities offerings involving felons and other bad actors from relying on Rule 506 of Regulation D. These rules are required to be ''substantially similar'' to the disqualification rules in Rule 262 (which apply to Regulation A offerings as well as offerings under Rule 505 of Regulation D) and also to cover the matters enumerated in Section 926 (including certain state regulatory orders and bars). We believe the rules we are adopting comply with that mandate. The final rules include the following provisions not specifically required under Section 926:

- A reasonable care exception;
- Mandatory disclosure of triggering events pre-dating the effective date of the rule amendments;
- The inclusion of additional triggering events for certain orders of the CFTC and for Commission cease-and-desist orders relating to scienter-based anti-fraud violations and violations of Section 5 of the Securities Act;
- The addition of coverage of investment managers of pooled investment funds and directors, executive officers, other officers participating in the offering, general partners and managing members of such investment managers and directors, executive officers and other officers participating in the offering of such general partners and managing members;
- Narrower coverage of officers of issuers and financial intermediaries (covering only executive officers and officers participating in the offering, rather than all officers);
- Narrower coverage of shareholders of the issuer (covering only beneficial owners of at least 20% of the issuer's outstanding voting securities, calculated on the basis of voting power, rather than 10% of any class of the issuer's equity securities); and
- A provision under which disqualification will not be triggered by regulatory orders if the authority that issued the order advises in writing that Rule 506 disqualification should not arise.

While commenters had differing views on whether disqualification under Rule 506 could or should be applied to events that occurred before the effective date of the rule amendments, we determined to apply disqualification only to events that occur after effectiveness of the rule amendments.

As noted above, we are requiring disclosure of disqualifying events that pre-date effectiveness of the amendments.

We are sensitive to the costs and benefits imposed by our rules. The discussion below attempts to address both the costs and benefits of Section 926 of the Dodd-Frank Act itself, as well as the incremental costs and benefits of the rules and rule amendments associated with the exercise of our discretion in implementing Section 926. The costs and benefits attributable to the statutory mandate and those attributable to our discretion may not be entirely separable to the extent that our discretion is exercised to realize the benefits that we believe were intended by the Dodd-Frank Act.

Section 2(b) of the Securities Act [250] requires us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. We have considered those issues as part of this economic analysis.

B. Economic Baseline

The baseline analysis that follows is in large part based on information collected from Form D filings submitted by issuers relying on Regulation D to raise capital. As we describe in more detail below, we believe that we do not have a complete view of the Rule 506 market, particularly with respect to the amount of capital raised. Currently, issuers are required to file a Form D within 15 days of the first sale of securities, and are required to report additional sales through amended filings only under certain conditions. In addition, issuers may not report all required information, either due to error or because they do not wish to make the information public. Commenters have suggested and we also have evidence that some issuers do not file a Form D for their offerings in compliance with Rule 503.[251] Consequently, the analysis that follows is necessarily subject to these limitations in the current Form D reporting process.

1. Size of the Exempt Offering Market

Exempt offerings play a significant role in capital formation in the United States. Offerings conducted in reliance on Rule 506 account for 99% of the capital reported as being raised under Regulation D from 2009 to 2012, and represent approximately 94% of the number of Regulation D offerings.[252] The significance of Rule 506 offerings is underscored by the comparison to registered offerings. In 2012, the estimated amount of capital reported as being raised in Rule 506 offerings (including both equity and debt) was $898 billion, compared to $1.2 trillion raised in registered offerings.[253] Of this $898 billion, operating companies (issuers that are not pooled investment funds) reported raising $173 billion, while pooled investment funds reported raising $725 billion.[254] The amount reported as being raised by pooled investment funds is comparable to the amount of capital raised by registered investment funds. In 2012, registered investment funds (which include money market mutual funds, long-term mutual funds, exchange-traded funds, closed-end funds and unit investment trusts) raised approximately $727 billion.[255]

In 2011, the estimated amount of capital (including both equity and debt) reported as being raised in Rule 506 offerings was $849 billion compared to $985 billion raised in registered offerings.[256] Of the $849 billion, operating companies reported raising $71 billion, while pooled investment funds reported raising $778 billion.[257] More generally, when including offerings pursuant to other exemptions—Rule 144A, Regulation S and Section 4(a)(2)—significantly more capital appears to be raised through exempt offerings than registered offerings (Figure 1).[258]

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[250] 15 U.S.C. 77b(b).

[251] Many commenters asserted that non-compliance with Form D filing obligations is widespread. *See, e.g.,* letters from Investor Advisory Committee (stating that ''[i]t is generally acknowledged that a significant number of issuers do not currently file Form D. . . .''); AARP (stating that ''[s]imply adding a checkbox to a form that too often goes unfiled and then only after the fact is inadequate to the task at hand.''); AFL–CIO and AFR (stating that ''many issuers today flout the Form D filing requirement for such offerings, further limiting the Commission's ability to provide effective oversight''). *See also* Securities and Exchange Commission, Office of Inspector General, *Regulation D Exemption Process* (Mar. 31, 2009) (''OIG Report''), available at: *http://www.sec-oig.gov/Reports/AuditsInspections/2009/459.pdf* (stating that while the Commission staff ''strongly encourage companies to comply with Rule 503, they are aware of instances in which issuers have failed to comply with Rule 503 . . .''). Based on its analysis of the filings required by FINRA Rules 5122 and 5123 during the period of December 3, 2012 to February 5, 2013, DERA estimates that as many as 9% of the offerings represented in the FINRA filings for Regulation D or other private offerings that used a registered broker did not have a corresponding Form D.

[252] *See* Vladimir Ivanov and Scott Bauguess, *Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009–2012* (July 2013), available at *http://www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf* (''Ivanov/Bauguess Study'').

[253] *See id.*

[254] *See id.*

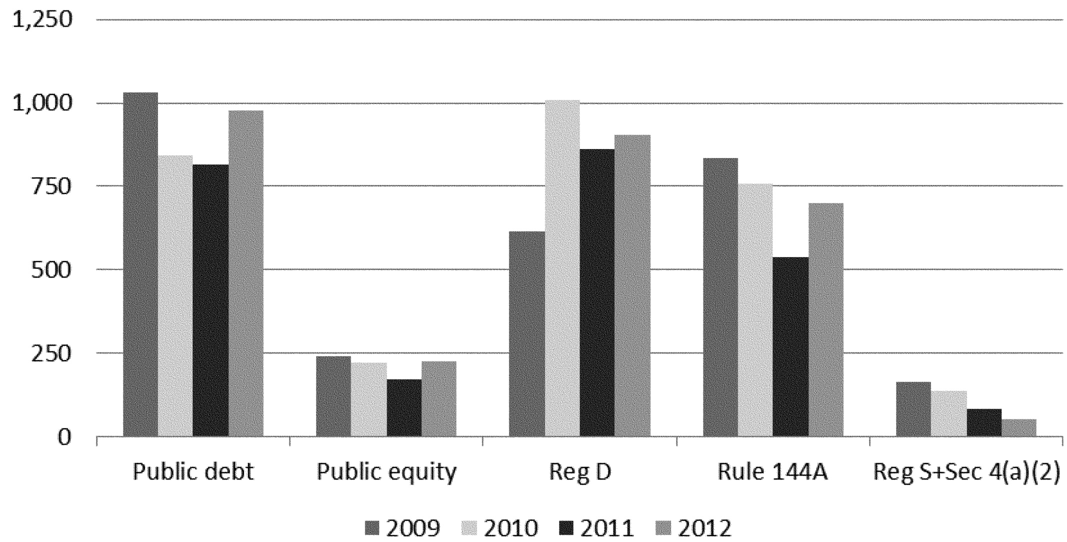
[255] In calculating the amount of capital raised by registered investment funds, we use the net amounts (plus reinvested dividends and reinvested capital gains), which reflect redemptions, and not gross amounts, by open-ended registered investment funds because they face frequent redemptions, and do not have redemption restrictions and lock-up periods common among private funds. In addition, we use the new issuances of registered closed-end funds and the new deposits of registered unit investment trusts. *See* 2013 Investment Company Institute Factbook, available at *http://www.icifactbook.org.*

[256] *See* Ivanov/Bauguess Study.

[257] *See id.*

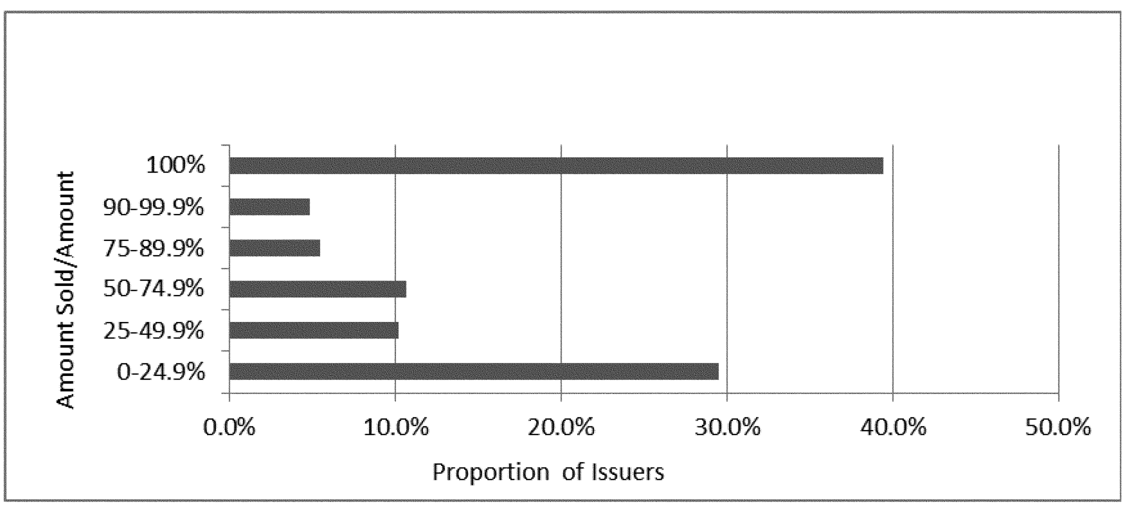
[258] *See id.*

Figure 1: Capital Raised in U.S. Capital Markets during 2009-2012[259]



At present, issuers are required to file a Form D not later than 15 days after the first sale of securities in a Regulation D offering and an amendment to the Form D only under certain circumstances. Since issuers are not required to submit a filing when an offering is completed, and submit amendments only under certain circumstances, we have no definitive information on the final amounts raised. Figure 2, below, illustrates that at the time of the initial Form D filing, only 39% of offerings by non-pooled investment fund issuers were completed relative to the total amount sought. Separately, 70% of pooled investment funds state their total offering amount to be ''Indefinite'' in their Form D filings. As a result, the initial Form D filings of these pooled investment funds likely do not accurately reflect the total amount of securities offered or sold.

Figure 2: Amount Sold as Percentage of Total Offering Amount by Non-Pooled Investment Fund Issuers in Regulation D Offerings at the Time of Form D Filing: 2009-2012



2. Affected Market Participants

The amendments to Rule 506 we are adopting today will affect a number of different market participants. Issuers of securities in Rule 506 offerings include both reporting and non-reporting operating companies and pooled investment funds. Investment advisers organize and sponsor pooled investment

[259] The 2012 non-ABS Rule 144A offerings data is based on an extrapolation of currently available data through May 2012 from Sagient Research System's Placement Tracker database. For more detail, see the Ivanov/Bauguess Study.

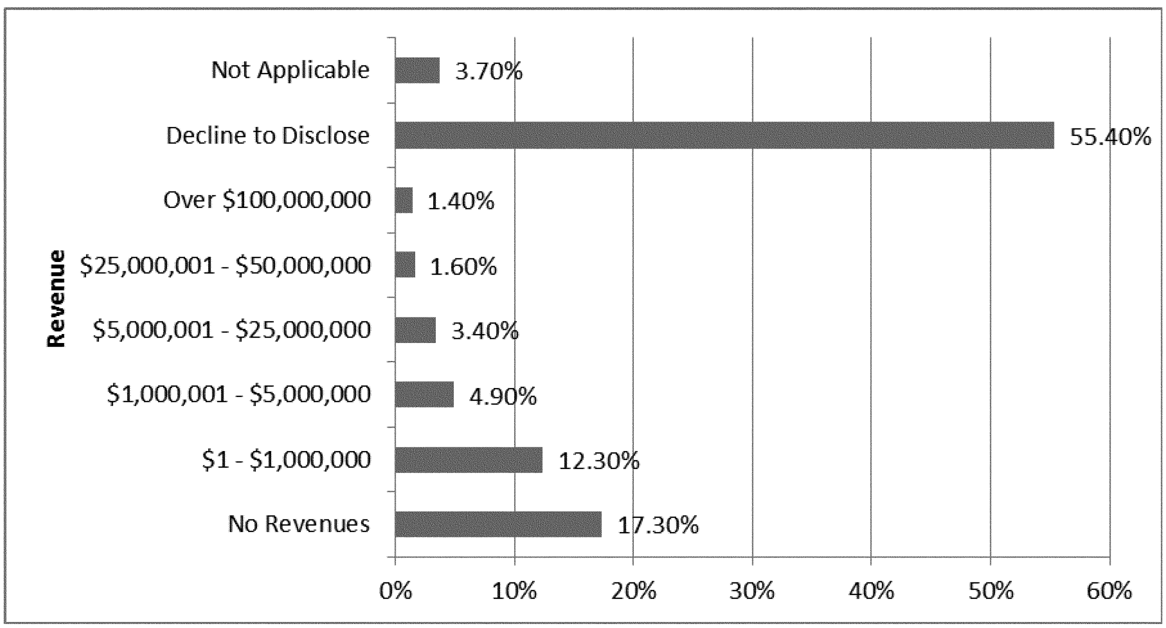
funds that conduct Rule 506 offerings. Intermediaries that facilitate Rule 506 offerings include registered broker-dealers, finders and placement agents. Investors in Rule 506 offerings include accredited investors (both natural persons and legal entities) and non-accredited investors who meet certain ''sophistication'' requirements. Each of these market participants is discussed in further detail below.

a. Issuers

Based on the information submitted in 112,467 new and amended Form D filings between 2009 and 2012, there were 67,706 new Regulation D offerings by 49,740 unique issuers during this four-year period.[260] The size of the average Regulation D offering during this period was approximately $30 million, whereas the size of the median offering was approximately $1.5 million.[261] The difference between the average and median offering sizes indicates that the Regulation D market is comprised of many small offerings, which is consistent with the view that many smaller businesses are relying on Regulation D to raise capital, and a smaller number of much larger offerings.

Some information about issuer size is available from Item 5 in Form D, which calls for issuers in Regulation D offerings to report their size in terms of revenue ranges or, in the case of certain pooled investment funds, net asset value ranges. All issuers can currently choose not to disclose this size information, however, and a significant majority of issuers that are not pooled investment funds declined to disclose their revenue ranges in the Forms D that they filed between 2009 and 2012. For those that did, most reported a revenue range of less than $1 million (Figure 3).[262] During the 2009–2011 period, approximately 10% of all public companies raised capital in Regulation D offerings; in 2012, approximately 6% of such companies did so.[263] These public companies tended to be smaller and less profitable than their industry peers, which illustrates the significance of the private capital markets to smaller companies, whether public or private.[264]

Figure 3: Distribution of Non-Pooled Investment Fund Issuers in Regulation D Market by Revenue: 2009-2012



During this period, pooled investment funds conducted approximately 24% of the total number of Regulation D offerings and raised approximately 81% of the total amount of capital raised in Regulation D offerings.[265] More than 75% of pooled investment funds declined to disclose their net asset value range.

[260] *See* Ivanov/Bauguess Study.

[261] *See id. The average and median amounts are calculated based on the amounts sold by Regulation D issuers as reported in their Form D filings.* A study of unregistered equity offerings by publicly-traded companies over the period 1980–1996 found that the mean offering amount was $12.7 million, whereas the median offering amount was $4.5 million. *See* M. Hertzel, M. Lemon, J. Linck, and L. Rees, *Long-Run Performance Following Private Placements of Equity,* 57 Journal of Finance (2002), 2595–2617.

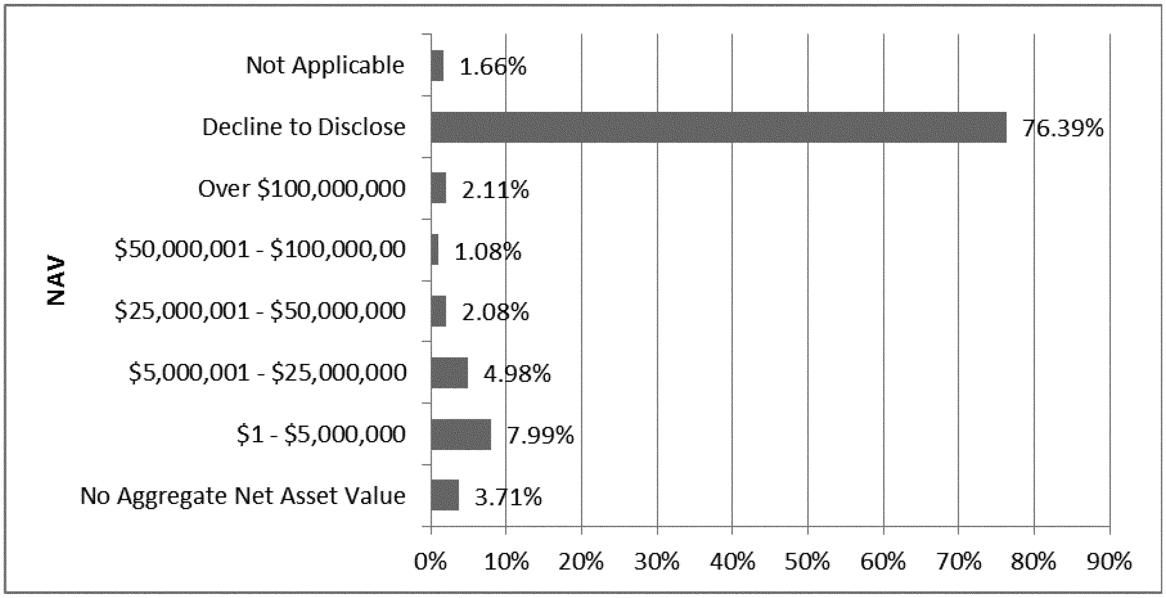
[262] *See* Ivanov/Bauguess Study.

[263] *Id.* (explaining methodology of using listings in the Standard & Poor's Compustat database and the University of Chicago's Center for Research in Securities Prices database to determine which companies were public companies).

[264] *Id.*

[265] *Id.*

Figure 4: Distribution of Pooled Investment Fund Issuers in Regulation D Market by Net Asset Value: 2009-2012



Between 2009 and 2012, approximately 66% of Regulation D offerings were of equity securities, and almost two-thirds of these were by issuers other than pooled investment funds.[266] Non-U.S. issuers accounted for approximately 19% of the amount of capital raised in Regulation D offerings, indicating that the U.S. market is a significant source of capital for these issuers.[267]

b. Investors

We have relatively little information on the types and number of investors in Rule 506 offerings. Form D currently requires issuers in Rule 506 offerings to provide information about the total number of investors who have already invested in the offering and the number of persons who do not qualify as accredited investors.[268] In 2012, approximately 153,000 investors participated in offerings by operating companies, while approximately 81,000 investors invested in offerings by pooled investment funds.[269] Because some investors participate in multiple offerings, these numbers likely overestimate the actual number of unique investors in these reported offerings. In offerings under Rule 506(b), both accredited investors and up to 35 non-accredited investors who meet certain sophistication requirements are eligible to purchase securities. In offerings under new Rule 506(c), only accredited investors will be eligible to purchase securities.

Information collected from Form D filings indicates that most Rule 506 offerings do not involve broad investor participation. More than two-thirds of these offerings have ten or fewer investors, while less than 5% of these offerings have more than 30 investors. Although Rule 506 currently allows for the participation of non-accredited investors who meet certain sophistication requirements, such non-accredited investors reportedly purchased securities in only 11% of the Rule 506 offerings conducted between 2009 and 2012.[270] Only 8% of the offerings by pooled investment funds included non-accredited investors, compared to 12% of the offerings by other issuers.[271]

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[266] *Id.*

[267] *Id.*

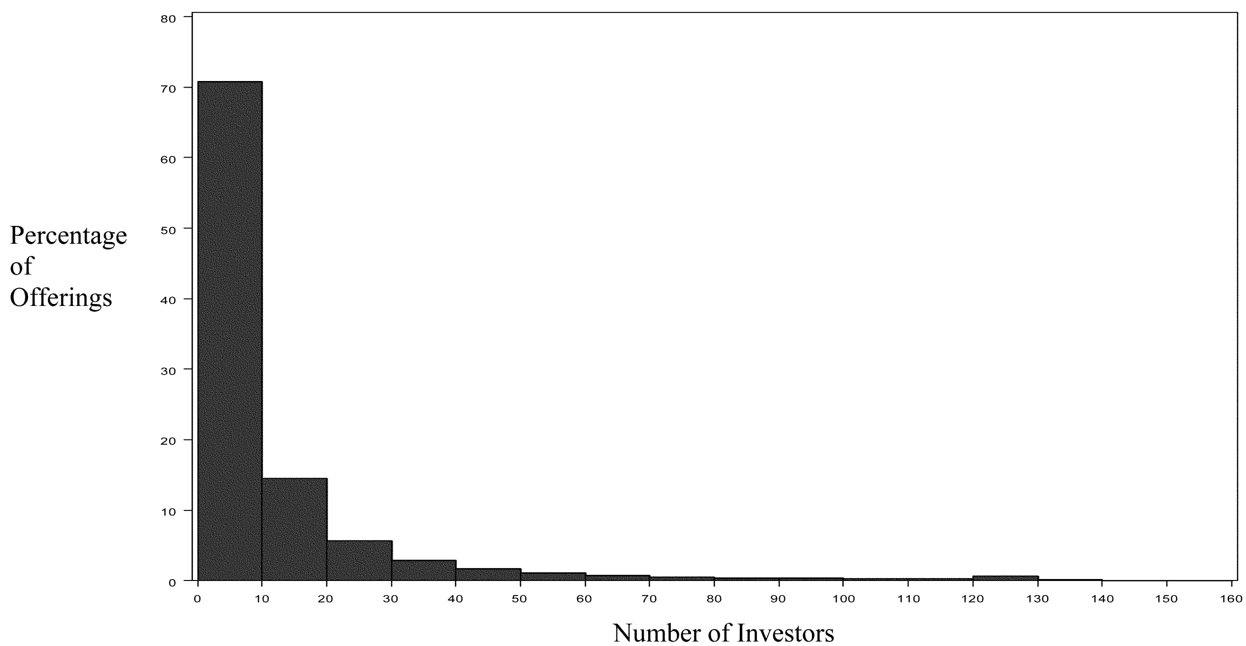
[268] *See* Item 14 of Form D. Form D does not require any other information on the types of investors, such as whether they are natural persons or legal entities.

[269] These numbers are based on initial Form D filings submitted in 2012.

[270] *See* Ivanov/Bauguess Study.

[271] *Id.*

Figure 5: Distribution of Regulation D Offerings by Number of Investors: 2009-2012



As stated above, between 2009 and 2012, the size of the median Regulation D offering, based on the information in Form D filings, was approximately $1.5 million. The presence of so many relatively small offerings suggests that a sizable number of current investors in Rule 506 offerings are natural persons or legal entities in which all equity owners are natural persons. This is because smaller offerings may not provide sufficient scale for institutional investors to earn a sizable return. Institutional investors typically have a larger investible capital base and more formal screening procedures compared to investors who are natural persons, and the associated costs of identifying potential investments and monitoring their investment portfolio lead them to make larger investments than natural persons.[272] As for whether natural persons investing in these offerings are accredited investors or non-accredited investors, almost 90% of the Regulation D offerings conducted between 2009 and 2012 did not involve any non-accredited investors.[273]

While we do not know what percentage of investors in Rule 506 offerings are natural persons, the vast majority of Regulation D offerings are conducted without the use of an intermediary,[274] suggesting that many of the investors in Regulation D offerings likely have a pre-existing relationship with the issuer or its management because these offerings would not have been conducted using general solicitation. This category of investors is likely to be much smaller than the total number of eligible investors for Rule 506(c) offerings, which is potentially very large. We estimate that at least 8.7 million U.S. households, or 7.4% of all U.S. households, qualified as accredited investors in 2010, based on the net worth standard in the definition of ''accredited investor'' (Figure 6).[275]

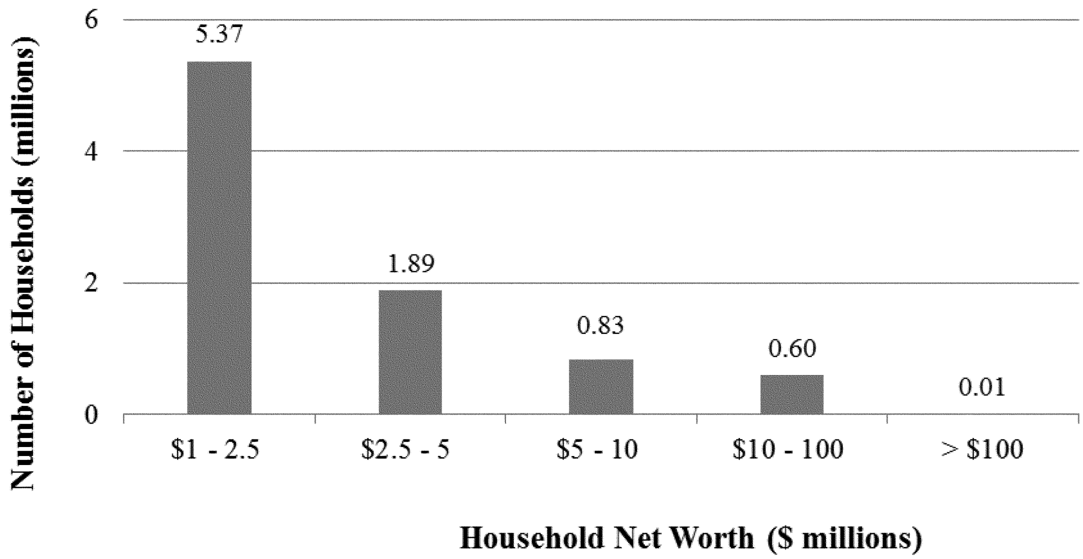
[272] See, *e.g.,* George Fenn, Nellie Liang and Stephen Prowes, The Economics of Private Equity Markets. (1998); Steven Kaplan and Per Stromberg, *Leveraged Buyouts and Private Equity,* Journal of Economic Perspectives (2009).

[273] *See* Ivanov/Bauguess Study.

[274] An analysis of all Form D filings submitted between 2009 to 2012 shows that approximately 11% of all new offerings reported sales commissions of greater than zero because the issuers used intermediaries. *See* Ivanov/Bauguess Study. We assume that the lack of a commission indicates the absence of an intermediary.

[275] This estimate is based on net worth and household data from the Federal Reserve Board's Triennial Survey of Consumer Finances (''SCF'') 2010. Our calculations are based on 32,410 observations in the 2010 survey.

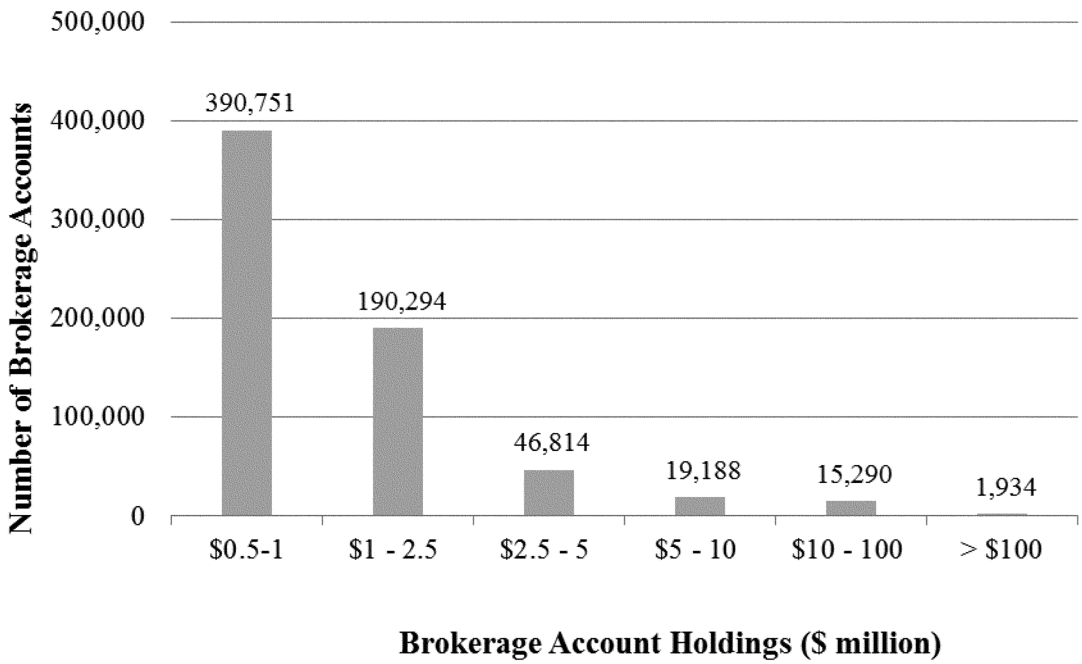
Figure 6: Number of U.S. Households that Qualify as Accredited Investors Based on 2010 Net Worth



Our analysis, however, leads us to believe that only a small percentage of these households are likely to participate in securities offerings, especially exempt offerings. First, as mentioned above, data from Form D filings in 2012 suggests that fewer than 234,000 investors (of which an unknown subset are natural persons) participated in Regulation D offerings, which is small compared to the 8.7 million households that qualify as accredited investors. Second, evidence suggests that only a small fraction of the total accredited investor population has significant levels of direct stockholdings. Based on an analysis of retail stock holding data for 33 million brokerage accounts in 2010, only 3.7 million accounts had at least $100,000 of direct investments in equity securities issued by public companies listed on domestic national securities exchanges, while only 664,000 accounts had at least $500,000 direct investments in such equity securities (Figure 7).[276] Assuming that investments in publicly-traded equity securities are a gateway to investments in securities issued in exempt offerings, and accredited investors with investment experience in publicly-traded equity securities are more likely to participate in an exempt offering than accredited investors who do not, the set of accredited investors likely to be interested in investing in Rule 506(c) offerings could be significantly smaller than the total accredited investor population.

[276] This analysis by DERA is based on the stock holdings of retail investors from more than 100 brokerage firms covering more than 33 million accounts during the period June 2010–May 2011.

Figure 7: Direct Stock Holdings of Retail Investors, 2010



c. Investment Managers

Based on Form ADVs that were filed with the Commission as of June 2013, there were 7,772 SEC reporting investment advisers that have clients that are private funds, registered investment companies business development companies, or other pooled investment vehicles. These investment advisers include:

• Registered investment advisers. Data filed for 2012 show that there were approximately 5,400 Commission-registered investment advisers with pooled investment fund clients that filed Form ADV with the Commission. These 5,400 investment advisers represent approximately $45.3 trillion total assets under management for pooled investment funds, or average assets under management of $8.4 billion per adviser. Of these, 4,044 investment advisers had clients that were private funds, with total assets under management of $35.2 billion and average assets under management of $8.6 billion.

• Exempt reporting advisers. These are investment advisers that are required to report on Form ADV but not to register with the Commission (for example, investment advisers to venture capital funds). Based on ADV data, there were 2,303 exempt reporting advisers in 2012, all of which had pooled investment funds as clients, with approximately $1.6 trillion of assets under management.

We do not have information regarding investment advisers with assets under management of less than $100 million, which are not generally required to register with the Commission, or investment managers that advise pooled investment funds with respect to investments in assets other than securities, such as commodities or real estate.

d. Broker-Dealers

As of December 2012, there were 4,450 broker-dealers registered with the Commission who file on Form X–17A–5, with average total assets of approximately $1.1 billion per broker-dealer. The aggregate total assets of these registered broker-dealers are approximately $4.9 trillion. Of these registered broker-dealers, 410 are dually registered as investment advisers. The dually registered broker-dealers are larger (average total assets of $6.4 billion) than those that are not dually registered. Among the dually registered broker-dealers, we identified 24 that currently have or have had private funds that submitted Form D filings between 2002 and 2012.

3. Estimated Incidence of ''Bad Actors'' in Securities Markets Generally

The economic impact of the rule amendments primarily depends on the extent to which they succeed in reducing fraud in the Rule 506 marketplace. This, in turn, depends on multiple factors, including the incidence of bad actors in Rule 506 offerings, the recidivism rate of such bad actors and the potential deterrent effect of disqualification as a sanction.

The disqualification rules should reduce the participation of both new and existing bad actors in Rule 506 offerings. Offerings will no longer be eligible to rely on Rule 506 if they involve a covered person that becomes a bad actor because of a triggering event that occurs after the new rules take effect. While triggering events existing before effectiveness of the rule will not be disqualifying, issuers will be required to provide disclosure about such events to investors. Participation in Rule 506 offerings by bad actors not disqualified by the rules we adopt today may, therefore, also be limited if issuers or investors are reluctant to transact with bad actors or participate in transactions involving bad actors once they become aware of the bad act through the required disclosure.

The effects of disqualification also depend on the likelihood that participation of bad actors in Rule 506 offerings would lead to the recurrence in perpetration of triggering events. This depends on the recidivism rates among bad actors.

Finally, the passage of the rule, through the deterrent effect of a potential threat of disqualification, could have the indirect impact of reducing the number of bad actors in the securities markets and the conduct resulting in sanctions that trigger disqualification.

Although it is impossible to predict future market participant behavior that may arise in response to the adopted rules, we can quantify, in certain instances, past occurrences of certain triggering events to provide an estimate of the historical incidence of bad actors—as determined under the new rules—in securities markets as a general matter.

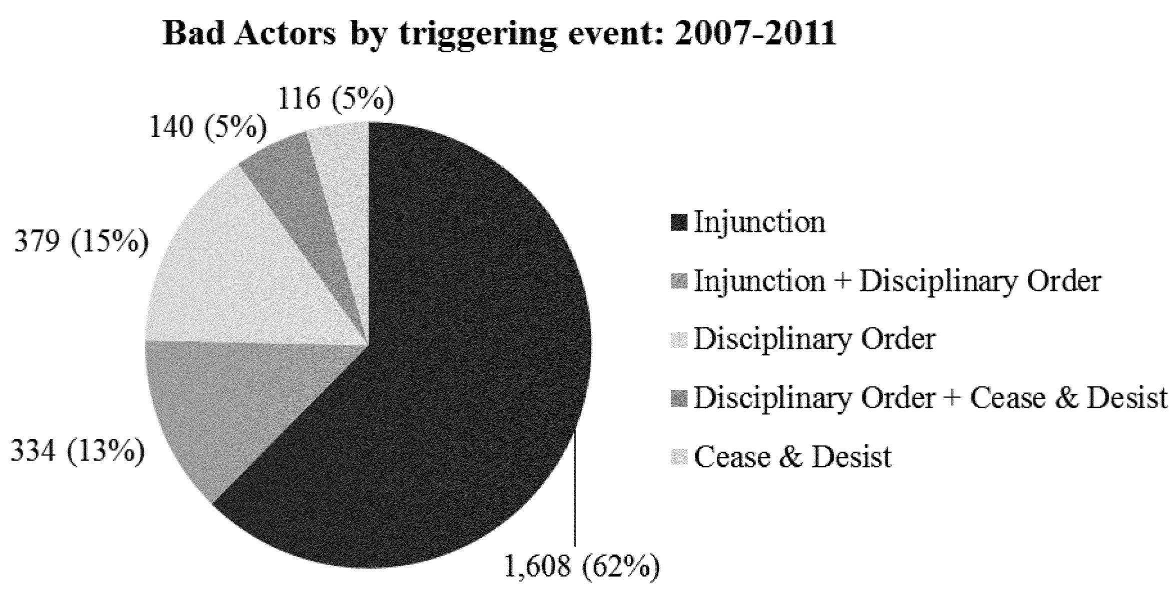
Identification of Triggering Events. To assess the incidence in the securities markets of potentially disqualifying ''bad actors,'' we examined the legal proceedings brought by the Commission during the five-year period from 2007 to 2011 in which the sanctions imposed would constitute triggering events under the new rule. We searched records of public proceedings, including case name, defendant name, code section violation, and sanction. To conduct the search, we used search terms pertaining to:

- Injunctions and court orders (which we refer to collectively as ''injunctions'') against conduct or practices in connection with the purchase or sale of a security, involving the making of a false filing with the Commission, or arising out of the conduct of business of certain financial intermediaries, as provided in Rule 506(d)(1)(ii);
- Commission disciplinary orders under Section 15(b) or 15B(c) of the Exchange Act or Section 203(e) or (f) of the Advisers Act that suspend or revoke registration, limit activities or bar a person from association with a regulated entity or from participation in a penny stock offering, as provided in Rule 506(d)(1)(iv); and
- Commission cease-and-desist orders relating to violations of scienter-based anti-fraud provisions of the federal securities laws or violations of Section 5 of the Securities Act, as provided in Rule 506(d)(1)(v).

Our analysis did not consider other bad actor triggering events in Rule 506(d)(1), primarily because we do not have a comparable ability to search databases relevant to criminal convictions or the actions of relevant state and other federal regulators.[277] In addition, it is possible that the search techniques used by staff may not have identified all relevant potential triggering events and bad actors. Since our analysis is subject to these limitations, our estimates of the incidence of potential bad actors likely represent a lower bound. On the other hand, not all of the bad actors identified in our search would be expected to be involved with Rule 506 offerings.

Our search of Commission enforcement actions identified a sample of 2,578 persons, including both individuals and entities, that received injunctions, disciplinary orders, and/or cease-and-desist orders, issued in a total of 1,485 enforcement cases over the five-year period. We found that an aggregate of 3,053 disqualifying sanctions (1,943 injunctions, 853 disciplinary orders, and 257 cease-and-desist orders) were imposed upon these persons. In some instances, a person received more than one sanction, which in most cases consisted of a combination of an injunction and a disciplinary order.[278] Each one of these sanctions would have constituted a triggering event under this rule, which would have disqualified any offering from relying on Rule 506 if the person were a ''covered person,'' such as a director or executive officer of the issuer or a financial intermediary. The following chart shows the breakdown of triggering events by type:

Figure 8: Distribution of Bad Actors by Triggering Events, 2007-2011



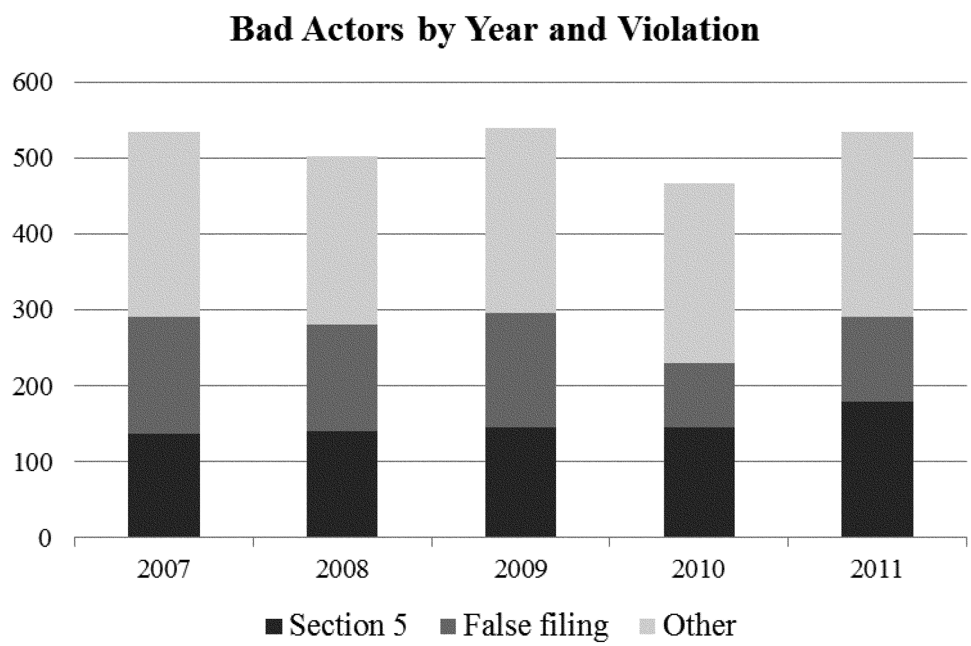
[277] We have limited information available on enforcement activity by state securities regulators, discussed at the text accompanying note 283. Our analysis did not cover felony and misdemeanor convictions as provided in Rule 506(d)(1)(i); final orders of state authorities and Federal banking agencies and National Credit Union Association as provided in Rule 506(d)(1)(iii); disciplinary actions by a national securities exchange or an affiliated securities association, as provided in Rule 506(d)(1)(vi); and United States Postal Service orders as provided in Rule 506(d)(vii). We also excluded refusal, stop, or suspension orders pertaining to registration statements or Regulation A offering statements, as provided in Rule 506(d)(1)(vii), because they are too infrequent to affect our analysis.

[278] One case involving both an injunction and a cease-and-desist order is not reflected in the chart titled ''Triggering Events: 2007–2011'' due to rounding.

In the cases we identified, between 70% and 78% of triggering events each year were against individuals, with the remainder against entities. With 83,521 offerings that relied on Rule 506 during the period under review, the incidence of detected bad actors is approximately 0.03 per offering. These numbers represent, however, only enforcement actions brought by the Commission. These numbers do not reflect enforcement action by other authorities (for example, state level regulators), nor do they include undetected bad actors.

While all of the 2,578 identified bad actors would disqualify any offering in which they were involved from reliance on Rule 506, not all of the bad actors would be expected to be involved with Rule 506 offerings. Many of the triggering events, such as insider trading, involve bad actors engaged in secondary market transactions. These persons may present a lesser risk of entering primary issuance markets such as Rule 506. Hence, the aggregate number of bad actors may overestimate the incidence of bad actors operating in the Rule 506 market. To more accurately estimate the likelihood that a bad actor might be involved in the issuance of securities, we identify triggering events involving a Section 5 violation.[279] As reflected in the chart ''Bad Actors by Year and Violation'' below, approximately 29% of the bad actors (a total of 748) were sanctioned for Section 5 violations. A similar percentage, approximately 25%, were sanctioned for the next-largest category of violations, those involving false filings.[280] The remaining bad actors fall into the ''Other'' category, of which insider trading-related violations represent the largest single sub-category. The following chart shows this breakdown:

Figure 9: Bad Actors by Year and Violation, 2007-2011



To assess the quality of the search results, from the 1,485 cases previously identified, we selected a random sample of 190 cases, a sample that is large enough to provide a low margin of error. Because a single case produces multiple triggering events if multiple persons are named, the sample of 190 cases included 529 potential triggering events and allows for a margin of error of less than 5% in our analysis.[281] Commission staff reviewed the orders, releases, and other documentation for all 190 cases to determine whether each potential triggering event actually met the criteria specified in Rule 506(d)(1)(ii), (iv) or (v). The review of the search results showed that the search criteria applied produced relatively accurate results.[282]

Incidence of Bad Actors Potentially Participating in Primary Offerings of Securities. Staff further refined the estimate of the likelihood that triggering events that were related to the Rule 506 market using the random sample of 190 cases. In particular, staff identified whether each of the cases involved an offering of securities by the issuer, which we refer to as a primary offering. For cases involving a primary offering, staff identified whether the offering was registered or unregistered. The review showed that 70 out of the 190 cases (or

[279] Bad actors included in the Section 5 category may have also violated other securities law provisions, such as anti-fraud provisions in Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act. Using Section 5 violations as a proxy for involvement in a securities offering may be under inclusive, as there may be offering-related misconduct without a Section 5 violation.

[280] We define false filing as violations relating to errors and omissions in Commission filings, such as periodic reports, Form BD, Form ADV and beneficial ownership reports.

[281] The margin of error in these estimates based on the sample size of 529 potential triggering events is approximately 3.6% at the 90% confidence level. Taking these results together, there may be as many as 30 more or 30 fewer disciplinary orders than what is estimated at the 90% confidence level.

[282] The misclassification rate for injunctions, disciplinary orders, and cease and desist orders was 4%, 30%, and 0% respectively. While the misclassification rate for disciplinary orders was high, the sample results for disciplinary orders contained nearly the same number of false positives (events classified as disciplinary orders that did not actually meet the criteria of Rule 506(d)(1)(iv)) as false negatives (events classified as injunctions and/or cease-and-desist orders that turned out to also include disciplinary orders), so the error in the total number of estimated disciplinary orders based on the sample review is significantly less than 30%. Accounting for offsetting misclassifications—*i.e.,* false positives and false negatives—the error rate in the total number of estimated disciplinary orders falls to 1%.

37%) involved a primary offering, all of which were unregistered, and of the 529 potential triggering events included in the 190 cases, 251 (or 47%) involved a primary offering.

For purposes of the review, defendants or respondents were categorized as ''issuers,'' ''intermediaries,'' and ''other persons.'' ''Issuers'' are entities that issue securities and the individuals who were affiliated with that issuer. ''Intermediaries'' are entities and individuals that facilitate securities offerings and investments, like brokers and non-affiliated investment advisers. ''Other persons'' are persons who are neither issuers nor intermediaries; the staff found that, in general, these were persons found liable for trading on inside information.

The following table summarizes the staff's findings with respect to these cases:

SUMMARY OF BAD ACTORS AND CASE TYPE FOR 2007 TO 2011 PERIOD

	Random sample of enforcement cases	Subset of sample relating to unregistered offerings
Number of cases	190	70 (37%)
Number of triggering events	529	251 (47%)
—issuers	278	160
—intermediaries	189	76
—entities acting as both issuers and intermediaries	17	15
—other persons	45	0

Of the 529 bad actors in the sample, staff found that 278 were issuers, 189 were intermediaries, 17 were entities that could qualify as either an issuer or an intermediary (such as a promoter who is employed by an issuer), and 45 were other persons.

Based on projections from our review of this sample, we estimate that during the 2007 to 2011 review period, 549 cases (37% of the 1,485 total cases) involved an unregistered offering and approximately 1,212 bad actors (47% of the 2,578 total bad actors identified) participated in those unregistered offerings. We consider these estimates as a lower bound for the number of bad actors because our analysis does not take into account bad actor triggering events other than those in subsections (ii), (iv), and (v) of Rule 506(d)(1) or offerings involving bad actors that did not give rise to enforcement activity. Taking those into account, the total number of bad actors is likely to be higher.

We considered other data sources regarding the number of bad actor triggering events not involving Commission action. NASAA's 2012 Enforcement Report presents some data on orders by state securities regulators between 2009 and 2011,[283] which would pertain to subsection (iii) of Rule 506(d)(1), relating to final orders and bars issued by state securities, insurance and banking regulators, federal banking regulators and the National Credit Union Administration. The report states that, as a result of state securities regulatory actions, 8,744 licenses were withdrawn and 1,952 licenses were denied, revoked, suspended, or conditioned in that three-year period. This data, however, may be over inclusive for purposes of establishing the number of bad actors under Rule 506(d) for a number of reasons. First, not all of the actions appear to be ''final orders'' under subsection (iii) of Rule 506(d)(1) (*e.g.,* some licenses were withdrawn rather than revoked). In addition, there is potential double counting in the NASAA survey when different states take action against the same person, as well as potential double counting between Commission and NASAA data for bad actors subject to both Commission and state sanctions. The data could also be under inclusive, in that it covers only actions by state securities regulators, whereas under subsection (iii) of Rule 506(d)(1), disqualification may also be triggered by orders of state insurance, banking, savings association and credit union regulators; appropriate federal banking regulators; and the National Credit Union Association. Staff were not able to identify comparable sources of data on these other types of orders.[284]

C. Analysis of Final Rules

Section 926 of the Dodd-Frank Act requires the Commission to adopt rules excluding felons and other bad actors from participation in Rule 506 offerings. The disqualification provisions of Rule 506 were intended to[285] and should lead to enhanced investor protection by reducing the number of offering participants who have previously engaged in fraudulent activities or who previously violated securities, insurance, banking or credit union laws or regulations, and by providing an additional deterrent to future fraudulent activities. Currently, persons covered by the disqualification provisions of these rules, such as issuers and compensated solicitors, are subject to a multilayered securities enforcement system that includes the Commission, state securities regulators and, for financial industry participants, FINRA. The disqualification rules we adopt today should alter industry practice by inducing issuers and other covered persons to implement additional measures to restrict bad actor participation in Rule 506 offerings.

In the proposing release, we solicited comment on the costs and benefits of the proposed rules. While no comment letters provided quantitative data or directly addressed the cost-benefit analysis included in the proposing release, a number of commenters did mention potential costs and benefits of the proposed rule. Our response to these comments is discussed in Section II above, and we briefly discuss these comments where they are relevant in the discussion below.

1. Effects of the Statutory Mandate

To the extent the new disqualification provisions result in a reduction of fraud in the Rule 506 offering market, investor losses to fraud will be reduced and investor willingness to participate in the

[283] North American Securities Administrators Association, 2012 Enforcement Report, Table 4 (available at *http://www.nasaa.org/wp-content/uploads/2011/08/2012-Enforcement-Report-on-2011-Data1.pdf*).

[284] FINRA's BrokerCheck database includes this data for registered broker-dealers and their associated persons, as well as data on investment advisers and their associated persons drawn from the Commission's IARD database. *See* note 202. BrokerCheck is searchable only by the name of firms and individuals, however, not by the nature of past violations, which makes it impracticable for us to use it as a source of data in this review.

[285] Statement of Senator Christopher Dodd, 156 Cong. Rec. S3813 (daily ed. May 17, 2010).

Rule 506 market could increase. This should lower the issuance costs for Rule 506 offerings to the extent that new disqualification standards lower the risk premium associated with the presence of bad actors in securities offerings.[286] Lower costs in the Rule 506 offering market could improve conditions for capital formation, benefitting both issuers and investors. In this regard, commenters also emphasized investor protection [287] and increased participation in the private placement market as the main benefits of the rule.[288]

The new disqualification provisions may also benefit investors by reducing the burden of the ''due diligence'' investigation they conduct on persons and entities involved in the offerings in which they invest. Without bad actor disqualification, investors seeking information about the background of issuers and the people involved with them would have to perform separate investigations due to the cost of coordinating collective action. Requiring issuers to determine whether any persons or entities are subject to an event that triggers disqualification may, for some investors, obviate the need to do their own investigation, which may eliminate some of the redundancies in these separate investigations. Given the issuer's advantage in accessing much of the relevant information, issuers should be able to perform the task at a lower cost than most individual investors.

The disqualification requirements also impose costs on issuers, covered persons and investors. In our analysis under the Paperwork Reduction Act in Part III.B above, we estimate that most issuers will bear an additional cost of $400 to conduct a factual inquiry to determine whether any covered persons had a disqualifying event that occurred before the effective date of the rule amendments.[289] We also estimate that approximately 220 [290] Rule 506 issuers will spend $5,200 on average for using in-house and outside professional services in preparing a disclosure statement describing matters that would have triggered disqualification under Rule 506(d)(1) of Regulation D had they occurred on or after the effective date of the rule amendments. These cost estimates are based on assumptions outlined in Part IV.B.3 above and represent lower bound estimates, given that our analysis in Part IV.B.3 did not cover all possible bad actor triggering events. We note, in addition, that the Paperwork Reduction Act analysis is not required to, and does not, consider all potential costs that market participants may incur in complying with Rule 506(d). Further, we cannot predict how issuers will respond to the possibility of having to disclose the participation of a bad actor in an offering; the issuer could disclose, remove the person from the offering, abandon the offering, or conduct an offering that does not require disclosure.

Issuers that are disqualified from reliance on Rule 506 will bear costs to the extent that alternative means of raising capital are unavailable or involve higher transaction costs that result in a higher cost of capital. In some circumstances, issuers may postpone or forgo capital raising, deferring engagement in potentially value-enhancing projects. This could entail forgone investment opportunities for disqualified issuers and for investors who otherwise would have invested in such issuers. Issuers that pursue alternative capital raising methods may incur higher costs associated with their capital raising. For example, all other things being equal, transaction costs are likely to be higher for issuers that raise capital in reliance on Section 4(a)(2) of the Securities Act outside of Rule 506 because of higher costs to comply with state securities law requirements and greater legal uncertainty about the requirements of the exemption. In addition, issuers eligible to rely on new Rule 506(c) will be able to use general solicitation and general advertising to find potential investors if all purchasers in their offering are accredited investors and the issuer takes reasonable steps to verify their accredited investor status,[291] whereas issuers seeking an exemption under Section 4(a)(2) outside of Rule 506(c) will continue to be constrained by the incompatibility of a claim of exemption under Section 4(a)(2) and general solicitation or general advertising.[292] This may further differentiate transaction costs and cost of capital between Section 4(a)(2) offerings and Rule 506(c) offerings. Registered securities offerings can also result in higher transaction costs than private offerings, and in addition trigger ongoing reporting responsibilities.[293] As highlighted above, 22% of Rule 506 issuers that reported revenues on Form D indicated that their revenues were less than $1 million. For these and similarly sized issuers, going public through a registered offering may not be a feasible substitute for a Rule 506 offering.[294]

Issuers may also incur costs in connection with changes to personnel, governance structures and capital raising plans as a result of disqualification. For example, issuers may incur costs from terminating disqualified individuals or from reassigning them to positions where they will not trigger a disqualification in the context of an offering, and hiring new personnel or retraining existing personnel to replace them. They may also incur costs incident to restructuring their governance and control arrangements if, for example, a general partner, managing member or investment manager of a pooled investment fund issuer is a bad actor whose involvement would result in the disqualification of the offering. Issuers may also incur costs in connection with terminating an engagement with a placement agent or other covered financial intermediary, and entering into a new engagement. Smaller issuers and issuers with limited operating histories may not be able to readily find a new placement agent or other financial intermediary.

[286] In a related framework, Karpoff et al. (2008) show that the marketplace imposes significant penalties on firms targeted by SEC enforcement actions for financial misrepresentation, where for each dollar of misrepresentation the firm loses an additional $3.08 due to expected legal penalties and loss of reputation. *See* J. Karpoff, D. Lee & G. Martin, The Cost to Firms of Cooking the Books, 581–611 Journal of Financial & Quantitative Analysis (Sept. 2008).

[287] *See* comment letters from M. Zhu; DTC; Better Markets; NASAA.

[288] *See* comment letter from Better Markets.

[289] We assume the cost of in-house attorney services to be $400 per hour. This estimate is based on data provided in the report titled *Management and Professional Earnings in the Securities Industry—2012,* which is published by the Securities Industry and Financial Markets Association.

[290] Staff estimates that there were at least 549 SEC enforcement actions involving an unregistered offering in which someone who would be disqualified as a bad actor participated in the five years from 2007 through 2011. *See* Part IV.B.3.

[291] As discussed above, we are adopting new Rule 506(c), 17 CFR 230.506(c), today. *See Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Release No. 33–9415 (July 10, 2013).*

[292] *Id.* at note 42 and accompanying text.

[293] A 2011 report prepared by a group called the ''IPO Task Force,'' which consisted of a group of professionals, including venture capitalists, experienced CEOs, public investors, securities lawyers, academics and investment bankers, estimated that the cost of going and staying public are high. Chart H of the IPO Task Force Report estimates that the average cost to go public is $2.5 million and the annual cost of staying public is $1.5 million. *See* Rebuilding the IPO On-Ramp: Putting Emerging Companies and the Job Market Back on the Road to Growth (publicly available at *http://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf*).

[294] For example, if an issuer intends to raise a small amount of capital to fund its operations, the costs of conducting a registered offering may make a registered offering impracticable. In addition, private funds that rely on exemptions from investment company registration under Section 3(c)(1) or 3(c)(7) of the Investment Company Act are not permitted to conduct public securities offerings.

The final rule will include as covered persons the beneficial owners of 20% or more of the issuer's outstanding voting equity, calculated on the basis of voting power. This reflects a change from the 10% or more beneficial ownership of any class of the issuer's equity originally proposed. The higher ownership standard, limitation to voting securities and calculation focused on voting power would increase the likelihood that the disqualified investor is more closely affiliated with the issuer and has greater input or control over the management of the issuer.[295] In our judgment, the higher threshold will therefore provide greater certainty that the investor has some level of influence with the issuer. In addition, because issuers cannot necessarily prohibit a bad actor from establishing a large ownership position, particularly when an issuer's security is traded among non-affiliates or in a secondary market, a higher threshold is expected to reduce the likelihood of a disqualifying event affecting an issuer in cases where a securityholder with a disqualifying bad act meets the beneficial ownership threshold in the rule but does not in fact exercise control or influence over the issuer. Lower uncertainty and relatively fewer ''covered persons'' arising from the amendment would reduce the costs of monitoring and due diligence for complying with the rule, and should limit the circumstances in which issuers must seek waivers from disqualification based on the involvement of bad actor investors that do not exercise influence or control over the issuer.

At the same time, determining whether a securityholder is covered based on ownership of voting securities, calculating ownership based on voting power across all outstanding securities rather than a single class and raising the threshold from 10% to 20% could reduce investor protection benefits, as securityholders whose ownership does not meet the threshold provided in the final rule, but who exercise control of an issuer, would not be covered. The inclusion of directors, officers and their functional equivalents under the definition of covered persons, however, may mitigate this effect; the rule will cover investors who serve those functions in relation to the issuer, regardless of their level of ownership.

With respect to 20% beneficial owners that are subject to triggering events, issuers may incur costs to buy out or otherwise induce such persons to reduce their ownership positions. Issuers may also incur costs in connection with taking steps to prevent bad actors from becoming 20% beneficial owners, such as exercising rights of first refusal and excluding bad actors from financing rounds. For certain issuers, finding investors to replace the capital represented by these shareholders or potential investors, as the case may be, could be challenging and expensive. Some commenters also expressed concerns about the aggregate costs of the proposed bad actor rule, saying that its provisions are generally unduly complex, unclear or not based on objective, bright-line standards.[296] Others expressed concerns about the potential burdens on capital raising,[297] and that it could undermine the overall utility of Rule 506.[298]

Issuers may also incur costs in connection with seeking waivers of disqualification from the Commission, or determinations by other authorities (such as state securities regulators) that their orders should not give rise to disqualification under Rule 506(d).

The new disqualification standards may also impose costs on other market participants that are subject to triggering events, such as financial intermediaries, by making them ineligible to participate in the market for Rule 506 offerings. For affected individuals, this may result in demotion or termination of employment, limitations on career advancement and fewer employment opportunities generally. For affected firms, this may result in revenue reductions and loss of market share, and could threaten the continued operation of firms that are heavily dependent on Rule 506 offerings as a source of revenue. Firms that are not themselves disqualified but whose officers, directors, general partners and managing members are subject to disqualifying events may incur additional costs from terminating or reassigning such individuals and from hiring new personnel or retraining existing personnel to replace them.

Bad actor disqualification rules may also impose costs on issuers and other market participants beyond the context of Rule 506 offerings. For example, imposing a new disqualification standard only on offerings under Rule 506, rather than on a more uniform basis, may result in higher costs for issuers relying on other exemptive rules, to the extent that differing disqualification standards create confusion and a more difficult compliance regime. Adopting uniform disqualification provisions throughout the Securities Act was cited by some commenters as a benefit, in that it could simplify compliance and increase overall investor protection.[299]

In addition, non-uniform application of the new disqualification standards may encourage bad actors to migrate to offerings under other exemptions. Investors may perceive a higher risk of fraud in such offerings, which would be detrimental to their marketability and result in greater issuance costs of all offerings under the exemptions that are not subject to the new standards, whether or not bad actors are involved. This could have an effect on competition by putting issuers that are not eligible to use Rule 506 at a competitive disadvantage.

Finally, there is a potential cost to investors of overreliance on Rule 506(d) in assessing the risks associated with an offering. Fraud can still occur without prior incidence of bad acting on the part of the issuer or covered persons, and in some cases it is possible that prior bad actions went undetected or did not otherwise result in a sanction, or may have resulted in a sanction that does not constitute a triggering event for disqualification.

2. Discretionary Amendments

The amendments not specifically required under the Section 926 mandate involve costs and benefits as analyzed below.

Reasonable Care Exception. The ''reasonable care'' exception allows continued reliance on the Rule 506 exemption, despite the existence of a disqualification with respect to a covered person, if the issuer can show that it did not know and, in the exercise of reasonable care, could not have known that the disqualification existed at the time of the sale of securities. We anticipate that the ''reasonable care'' exception will provide benefits to the efficiency of the private placement and capital formation process by removing a significant disincentive to issuers' use of Rule 506 that would have arisen if disqualification were applied on a strict liability basis. Without a reasonable care exception, issuers might choose not to undertake offerings in reliance on Rule 506, because of the risk of Section 5 or blue sky law violations in circumstances that the issuer cannot reasonably predict or control. In those circumstances,

[295] It would also be in line with the level at which filing as a passive investor is no longer permitted on Schedule 13G under Regulation 13D–G. *See* 17 CFR 230.13d–1(c).

[296] *See* comment letters from ABA Fed. Reg. Comm.; NYCBA; Cleary Gottlieb.

[297] *See* comment letters from B. Nelson; Coy Capital; Five Firms; S&C.

[298] *See* Angel Capital Comment Letter 1; *see also* comment letters from ABA Fed. Reg. Comm.; Karr Tuttle; SIFMA; S&C.

[299] *See* comment letters from ABA Fed. Reg. Comm.; C. Barnard; Better Markets; NASAA.

alternative approaches to capital raising may be more costly to the issuer or not available at all. Given that Rule 506 is the most frequently relied-upon Securities Act exemptive rule, the impact of issuers shifting away from it could be significant. We believe that the reasonable care exception provides a measured and balanced approach to preserve the intended benefits of Rule 506, which might otherwise be impaired because of issuer concerns about strict liability for unknown disqualifications.

Commenters uniformly supported the reasonable care exception, but also urged the Commission to provide greater clarity and specificity about what steps would constitute reasonable care. Some commenters raised concerns about compliance costs if the requirements of the ''reasonable care'' exception are too burdensome.[300] We do not believe it is appropriate to delineate and prescribe specific steps as being necessary or sufficient to establish reasonable care. We believe issuers should consider the totality of the offering taking into account the circumstances of the offering, the covered persons involved in the offering and the rule's requirements, which include specific disqualifying events and covered persons subject to those disqualifying events. The flexibility in permitting issuers to determine their own methodology for factual inquiry is a benefit that promotes efficiency to the extent the issuer is able to tailor its own inquiry without adherence to uniform standards that may not be applicable or appropriate in the context of a particular issuer or particular offering.

A potential cost of a reasonable care exception is that it may increase the likelihood that bad actors will be able to participate in Rule 506 offerings, because issuers may take fewer steps to make inquiry about offering participants than they would if a strict liability standard applied. If this occurs, it will decrease the deterrent effect of the bad actor disqualification rules. To the extent that the reasonable care exception fails to prevent participation by bad actors in Rule 506 offerings, the effectiveness of the new disqualification standard will be impaired.

Issuers may also incur costs associated with conducting and documenting their factual inquiry into possible disqualifications, so they can demonstrate the exercise of reasonable care. The fact that the rule does not specify what steps are required may increase such costs to the extent that issuers do more to conduct and document their inquiry than otherwise may be necessary, because of this uncertainty.

Disclosure Requirement for Triggering Events That Predate the Effectiveness of the Rule Amendments. As adopted, the amendments include a disclosure requirement designed to increase investor protection by requiring disclosure of events that would have been disqualifying had they occurred after the effective date of the amendments. This is a change from the proposal, under which disqualification would have arisen with respect to events that occurred before the amendments took effect.

Under the amendments we are adopting, issuers will be subject to disqualification only for triggering events that occur after the new rules take effect. On one hand, this approach will reduce costs that would otherwise have been incurred by issuers and other market participants subject to pre-existing triggering events, had they been disqualified from participating in Rule 506 offerings. On the other hand, this approach will permit offerings involving past bad actors to proceed under Rule 506, exposing investors to the risks that arise when bad actors are associated with an offering. While it is difficult to determine the net impact of implementing the new disqualification standards in this way, investors will benefit by having access to information about events that would be disqualifying if they had occurred after the effective date. Investors will be able to make their own determination of the relevance and risks associated with past bad acts, including recidivism risk, and can request additional information, elect not to pursue the investment opportunity or negotiate different terms based on this information.

We anticipate that the decision to require disclosure will provide a benefit to issuers and investors. We believe the disclosure requirement will serve as a useful tool to alert investors to the presence of certain participants in offerings under Rule 506 and allow them to make more informed investment decisions. Without a disclosure requirement, investors may have the mistaken impression that bad actors are no longer allowed to participate in Rule 506 offerings. As there is no prescribed format, the disclosure could be inserted in a non-prominent manner, such that an investor who reads the material in a cursory fashion could remain unaware of the participation of bad actors in the offering. Issuers could benefit from having flexibility in the manner of disclosure. In addition, because we have imposed a disclosure requirement rather than disqualification for pre-existing events, issuers will not be required to revisit past negotiated settlements or incur additional costs to request waivers for disqualification. Issuers will, however, incur costs in connection with the factual inquiry to determine whether disclosure is required and, if applicable, in preparing the mandatory disclosure for investors, which we have described in Section III above. Also, rather than provide the mandatory disclosure, we expect some issuers may decide to take steps to avoid having to make a disclosure, such as making changes to personnel or retaining different compensated solicitors, and in that respect may incur costs similar to those associated with avoiding or removing a potential disqualification.

We also recognize that issuers that disclose triggering events may have greater difficulty attracting investors to their offerings and may incur a higher cost of capital as a result. We do not have data with respect to current issuer practices involving disclosure of the participation of persons with a history of regulatory or other legal sanctions for securities law violations and, as such, we are unable to determine the extent to which the disclosure requirement will impact issuers' cost of capital. If investors are unwilling to participate in offerings involving prior bad actors, some issuers and other market participants will, as a practical matter, be excluded from the Rule 506 market and will experience some or all of the impact of disqualification.

Commission Cease-and-Desist Orders Involving Scienter-Based Anti-Fraud Violations and Violations of Securities Act Section 5. Under the rule amendments we adopt today, disqualification will be triggered by Commission cease-and-desist orders based on violations of scienter-based anti-fraud provisions of the federal securities laws or Section 5 of the Securities Act. The addition of these categories of Commission orders as a new triggering event is intended to provide a benefit to investors by screening out additional bad actors, while reducing the risk that disqualification would be imposed on securities law violators who do not pose a significant investor protection concern.

We believe the investor protection benefits of adding Commission cease-and-desist orders to the disqualification provisions of Rule 506 justify the potential costs to issuers and other covered persons. The benefits associated with screening bad actors out of the Rule 506 market should not depend on

[300] *See* Angel Capital Comment Letter 1; *see also* comment letter from S&C.

whether a particular enforcement action is brought in court or through a Commission administrative proceeding. Clearly, the absence of Commission cease-and-desist orders from an investor protection rule that includes federal judicial proceedings addressing the same legal violations, and orders by state and other federal regulators addressing the same conduct, would lead to asymmetry in the administration of disqualification under Rule 506. We also do not believe that the addition of Commission cease-and-desist orders is likely to impose a significant cost to issuers and other covered persons because these groups may already be subject to other disqualifying orders issued by the states, federal banking regulators and the National Credit Union Administration.

It is difficult to predict the extent to which adding these Commission cease-and-desist orders to the list of disqualifying events will increase the number of bad actors subject to disqualification from Rule 506 offerings. In our analysis of disqualifying events from 2007 through 2011 discussed earlier, we attempted to assess the number of individuals or entities that would be disqualified as bad actors based solely on Commission cease-and-desist orders described in subsection (v) of Rule 506(d)(1). We identified 116 cease-and-desist orders against respondents that were not otherwise subject to a disqualifying injunction, disciplinary order or felony conviction during the 2007 to 2011 period.[301] To the extent that these historical levels project future levels of disqualifying Commission cease-and-desist orders, we estimate that on an annual basis, there may be approximately 23 individuals or entities disqualified by cease-and-desist orders and not also by some other triggering event. To provide a context, there were in excess of 83,521 Rule 506 offerings during the period 2007–2011. With 116 cease and desist orders during the same period, the potential disqualification incidence created by Commission cease-and-desist orders would appear to be quite low (using these inputs, less than 0.15%).

In addition, inclusion of Commission cease-and-desist orders as a triggering event for bad actor disqualification may change how settlement negotiations are conducted between respondents and the Commission. Even after the Commission imposes a disqualifying cease-and-desist order upon a covered person, the Commission may grant an appropriate waiver from disqualification based on settlement negotiations or other remedial measures and steps taken by the covered person to comply with the Commission cease-and-desist order. We believe that issuers and other covered persons will be able to consider the practical consequences of a future Commission cease-and-desist order and alter their conduct to avoid committing the behavior causing the violation. Alternatively, they can seek to obtain a waiver of disqualification in enforcement settlement negotiations.

We anticipate that this additional triggering event will add minimal incremental costs for issuers, given the requirement in the rule as adopted to conduct factual inquiry to determine whether the offering is subject to bad actor disqualification. To the extent that the addition of a disqualifying event broadens the type and the number of covered persons who will be disqualified from participation in Rule 506 offerings, it may have a detrimental effect on capital raising activity by delaying or deterring offerings, or causing issuers to incur higher transaction costs.

CFTC Orders. Under the rule amendments we adopt today, disqualification will be triggered by orders issued by the CFTC to the same extent as orders of the regulators enumerated in Section 926 of the Dodd-Frank Act (*e.g.,* state securities, insurance and banking regulators, federal banking agencies and the National Credit Union Administration). We believe that including orders of the CFTC will result in the treatment of comparable sanctions similarly for disqualification purposes, and should enable the disqualification rules to more effectively screen out felons and bad actors. We note in that regard that the conduct that would typically give rise to CFTC sanctions is similar to the type of conduct that would result in disqualification if it were the subject of sanctions by another financial services industry regulator. In addition, the CFTC (rather than the Commission) has authority over the investment managers of pooled investment funds that invest in commodities and certain derivatives products; unless Rule 506(d) covers CFTC orders, regulatory sanctions against those investment managers are not likely to trigger disqualification.

We have a limited ability to quantify the impact of including CFTC orders as a new disqualification trigger under Rule 506(d). While we have access to general information about CFTC enforcement activity,[302] we have no systematic way to filter CFTC orders for connection to Rule 506 offerings or private placements or to isolate situations in which a participant in a Rule 506 offering would be subject to disqualification solely on the basis of a CFTC order. While registered broker-dealers are required to report CFTC proceedings and orders on Form BD, we have no systematic way to filter Form BD data on that basis or to identify registered broker-dealers that are likely to participate in Rule 506 offerings or private placements.

We were able to review disclosures concerning CFTC orders on Form ADV by registered investment advisers and exempt reporting advisers with pooled investment fund clients. In on our review of 384 Forms ADV (as described in detail below), we found six investment adviser firms associated with pooled investment funds that were subject to CFTC orders that would constitute triggering events under Rule 506(d).

Definition of ''final order.'' The change in the definition of ''final order'' limiting it to orders under statutory authority that provides for notice and an opportunity for hearing should have marginal economic impact for issuers. We do not believe that the incremental burden of inquiry to determine whether an order was issued under such authority will have a significant impact. The change could have the effect of reducing the number of disqualifying events for which issuers or other market participants might seek waivers which, in cases where the waiver would have been granted, would reduce costs and could facilitate capital formation. The economic impact on investors from this change will depend primarily on the extent to which the additional procedural requirement results in bad actors that would otherwise be disqualified remaining eligible to participate in Rule 506 offerings, and the recidivism rates of those bad actors.

Investment Managers. Under the rule amendments we adopt today, investment managers of issuers that are pooled investment funds (that is, investment advisers of pooled investment funds and persons who provide similar investment advisory

[301] As there is no comprehensive database of triggering events, the analysis included a review of litigation releases and other documentation for information on other events that would have disqualified these respondents. Some of these documents provided short disciplinary histories, but they are not comprehensive and in any case would not capture subsequent triggering events.

[302] *See e.g.,* Commodity Futures Trading Commission Annual Performance Report, Fiscal Year 2012 at Appendix A (available here: *http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/2012apr.pdf.*) A summary of CFTC enforcement proceedings from 2005 through 2008 is available here: *http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/file/pbproceedingsbulletin.pdf.*

services to pooled investment funds with respect to assets other than securities) have been added as a new category of covered person. We believe that this approach will reduce compliance costs, in that it represents a ''bright-line'' category of presumed control persons based on governance and control structures that are typical for pooled investment fund issuers, replacing a potentially costly fact-intensive inquiry into whether such persons should be deemed the equivalent of ''directors'' or ''executive officers'' of an issuer organized in corporate form. The addition of this new category facilitates equivalent treatment of operating companies and pooled investment funds under new Rule 506(d).

Incidence of Bad Actors Among Investment Advisers.

i. Analysis of Triggering Events Based on Enforcement Actions Initiated by the Commission

In the review described above in Section IV.B.3, we found that 47 of the random sample of 529 identified cases involved investment advisers (18 of these 47 were also broker-dealers). None of these 47 investment advisers was sanctioned in connection with a private offering. This, however, would represent only a lower bound for the incidence of bad actor triggering events among investment advisers, as the analysis was based on a random sample drawn from the legal proceedings that were brought before the Commission during the period 2007–2011. In addition, our analysis does not take into account bad actor triggering events other than those in subsections (ii), (iv), and (v) of Rule 506(d)(1) or offerings involving bad actors that did not give rise to enforcement activity.

ii. Form ADV Data

We analyzed all Form ADVs filed by investment advisers for 2012 to determine the reported incidence of disqualification triggering events. We limited our review to forms filed by investment advisers that:

• Advise a private fund or have clients that are registered investment companies, business development companies or other pooled investment vehicles;

• Provided disclosure reporting pages on their current Form ADV; and

• Indicated that some of the disclosure reporting pages are for the adviser itself or its supervised persons.

We considered only orders whose status was reported as final. Based on these criteria, we identified 384 investment advisers that disclosed matters that may have constituted a triggering event under Rule 506(d).

Looking at the cases and the regulatory and court actions involved, we determined whether the reported sanctions would constitute triggering events under Rule 506(d). Most of the sanctions would not because the criteria for providing disclosure reporting pages for Form ADV include many events that do not constitute bad actor triggering events under new Rule 506(d). For example, we excluded cases that were initiated by a foreign court or regulator, cases that involved an affiliate firm or cases that involved an individual employee of an affiliate who is not a control person in the parent advisory firm. We also excluded cases where a sanction fell outside the relevant look-back period, such as a Commission cease-and-desist order that is more than five years old. In addition, we excluded cases in which an action did not meet the relevant substantive criteria, such as Commission cease-and-desist orders for violations other than Section 5 of the Securities Act or a scienter-based anti-fraud provision, or felonies that were unrelated to the criteria of Rule 506(d), such as traffic violations.

After these exclusions, we found that approximately 1% of reporting investment advisers associated with pooled investment funds reported bad actor triggering events in their 2012 Form ADV. The results of our analysis are presented in the table below.[303]

	Number of investment advisers
Total investment advisers	13,173
Investment advisers advising pooled investment funds	7,772
Pooled investment fund investment advisers with disclosure reporting pages	435
Pooled investment fund investment advisers subject to final orders	384
Pooled investment fund investment advisers with 'bad actor' triggering events	48
Criminal sanctions	1
Regulatory sanctions	42
Civil sanctions	11

Analysis of Costs and Benefits. Investment managers play a significant role in the management of pooled investment funds. We have included them in the definition of covered persons so that entities or individuals that exercise control over fund management are subject to bad actor disqualification under Rule 506(d). It will therefore provide consistency for covering 'control persons' of both pooled investment fund issuers and issuers that are not pooled investment funds.

Additional issuer costs arising from the addition of investment managers as covered persons will arise from conducting factual inquiries and, in some cases, restructuring governance and control arrangements, preparing disclosure or obtaining waivers from disqualification for having an investment adviser with a history of bad acting. Our analysis shows that the incidence of disqualifying events is low (less than 1%) for investment advisers. So their inclusion in the list of covered persons should not be generally burdensome for issuers. On the other hand, covering investment managers directly will obviate the need for issuers to conduct a fact-intensive inquiry to determine whether an investment manager would be regarded as a *de facto* director or executive officer of a pooled investment fund, or as a promoter of such fund. As a result, the additional costs from this new category of covered person are not likely to be high.

Narrower Coverage of Officers of Issuers and Financial Intermediaries. Some commenters raised concerns that the compliance costs associated with monitoring a potentially large class of covered persons may be high.[304] The rules we are adopting limit the pool of covered persons by covering only executive officers and officers participating in the offering, rather than all officers, of issuers, underwriters, compensated solicitors and investment managers of pooled investment funds. This should reduce compliance costs by limiting covered persons to a more manageable number who should generally be easier to identify. It should also reduce or eliminate costs, such as lost employment opportunities, for individuals who are subject to potentially disqualifying events but are not executive officers of issuers, compensated solicitors or investment managers to pooled investment fund issuers and are not personally involved in Rule 506 offerings. We do not believe it will significantly compromise the intended investor protection benefits of the rule, because all officers performing policy-making functions or personally involved with the offering will be covered.

No Disqualification Where the Relevant Regulatory Authority Advises

[303] Note that since an investment adviser can be subject a combination of criminal, regulatory and civil sanctions, the sum of the three categories of sanctions may exceed the number of investment advisers that are subject to sanctions.

[304] *See* comment letters from SIFMA; NYCBA; Five Firms; S&C.

That Disqualification is Not Warranted. The amendments we are adopting include a provision under which disqualification will not arise if a state or federal regulator issuing an order advises in writing that Rule 506 disqualification is not necessary under the circumstances. We believe this provision will create cost savings for affected covered persons such as issuers, individuals and compensated solicitors by eliminating the need to seek waivers from the Commission or pursue other means of raising capital. We expect that some issuers and other covered persons will adjust their settlement negotiations to bargain for an express determination that disqualification from Rule 506 is unnecessary.[305] As the provision applies only where state or federal regulators have determined that Rule 506 disqualification is not necessary, we do not believe it is likely to impair the intended investor protection benefits of the bad actor disqualification scheme.

V. Final Regulatory Flexibility Act Analysis

This final regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 603. It relates to amendments to Rule 506 of Regulation D under the Securities Act that disqualify certain offerings where ''felons and other 'bad actors''' are participating or present from relying on Rule 506 for an exemption from registration under the Securities Act, or impose disclosure requirements in respect of such offerings.

A. Reasons for, and Objectives of, the Action

The primary reason for the amendments is to implement the requirements of Section 926 of the Dodd-Frank Act. Section 926 requires the Commission to issue rules under which certain offerings where ''felons and other 'bad actors''' are participating or present will be disqualified from reliance on Rule 506 under Regulation D for an exemption from registration under the Securities Act. Under the amendments adopted today, offerings will be disqualified for triggering events that occur after the effective date of the amendments, and disclosure to investors will be required in respect of triggering events that occur before the effective date.

Our primary objective is to implement the requirements of Section 926 of the Dodd-Frank Act. In general, the rule we are adopting implements the statutory requirements. We have included a ''reasonable care'' exception in the final amendments, which we believe will make the rule easier for issuers to use, and should encourage continued use of Rule 506 over exempt transactions outside of Rule 506. We have also added an additional disqualifying event for certain Commission cease-and-desist orders, which we believe will make the overall regulatory scheme more consistent and will increase the investor protection benefits of the amendments. We are requiring disclosure, rather than disqualification, for triggering events occurring before effectiveness of the final amendments as a means of enhancing protection of investors participating in offerings involving bad actors, without giving rise to the fairness and other concerns associated with applying the new disqualification provisions in respect of preexisting events.

B. Significant Issues Raised by Public Comment

In the proposing release, we requested comment on every aspect of the initial regulatory flexibility analysis (''IRFA''), including the number of small entities that would be affected by the proposed amendments, the nature of the impact, how to quantify the number of small entities that would be affected, and how to quantify the impact of the proposed amendments. We did not receive comments specifically addressing the IRFA. One commenter suggested exempting offerings below a certain size from the new disqualification provisions based on concerns about the cost of Securities Act registration if Rule 506 were unavailable,[306] but we do not believe that would be consistent with the requirements of Section 926 of the Dodd-Frank Act.

C. Small Entities Subject to the Rule Amendments

The amendments will affect issuers (including both operating businesses and investment funds that raise capital under Rule 506) and other covered persons, such as financial intermediaries, that are small entities. For purposes of the Regulatory Flexibility Act under our rules, an entity is a ''small business'' or ''small organization'' if it has total assets of $5 million or less as of the end of its most recent fiscal year and is engaged or proposing to engage in an offering of securities that does not exceed $5 million.[307] For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.

The final amendments will apply to all issuers that conduct offerings under Rule 506 and will affect small issuers (including both operating businesses and pooled investment funds that raise capital under Rule 506) relying on this exemption from Securities Act registration. All issuers that sell securities in reliance on Regulation D are required to file a Form D with the Commission reporting the transaction. For the year ended December 31, 2012, 16,067 issuers made 18,187 new Form D filings, of which 15,208 relied on the Rule 506 exemption. Based on information reported by issuers on Form D, there were 3,958 small issuers[308] relying on the Rule 506 exemption in 2012. This number likely underestimates the actual number of small issuers relying on the Rule 506 exemption, however, because over 50% of issuers declined to report their size.

D. Reporting, Recordkeeping and Other Compliance Requirements

The final amendments will impose a disclosure requirement with respect to triggering events that occurred before the effective date of the new disqualification provisions and would have triggered disqualification had they occurred after that date.[309] Such disclosure must be in writing and furnished to each purchaser a reasonable time prior to sale. There is no prescribed form that such disclosure must take.

In addition, we expect that issuers will exercise reasonable care to ascertain whether a disqualification exists with respect to any covered person, and document their exercise of reasonable care. The steps required will vary with the circumstances, but we anticipate would generally include making factual inquiry of covered persons and, where the issuer has reason to question the veracity or completeness of responses to such inquiries, further steps such as reviewing information on publicly available databases. In addition, issuers will have to prepare any necessary disclosure regarding preexisting events.

[305] *See* Rule 506(d)(2)(iii).

[306] *See* comment letter from Burningham.

[307] 17 CFR 230.157.

[308] Of this number, 3,627 of these issuers are not investment companies, and 331 are investment companies. We also note that issuers that are not investment companies disclose only revenues on Form D, and not total assets. Hence, we use the amount of revenues as a measure of issuer size.

[309] As discussed in Part II.G of this Release, we are also changing the form of the signature block of Form D.

We expect that the costs of compliance would generally be lower for small entities than for larger ones because of the relative simplicity of their organizational structures and securities offerings and the generally smaller numbers of individuals and entities involved.

E. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap or conflict with the final amendments to Rules 145, 147, 152 and 155; Rules 501 and 506 of Regulation D; and Form D under the Securities Act and to Rule 30–1 of our Rules of Organization and Program Management.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives of our amendments, while minimizing any significant adverse impact on small entities. In connection with the final amendments, we considered the following alternatives:

- The establishment of different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- The clarification, consolidation, or simplification of the rule's compliance and reporting requirements for small entities;
- The use of performance rather than design standards; and
- An exemption from coverage of the amendments, or any part thereof, for small entities.

With respect to the establishment of different compliance requirements or timetables under our final amendments for small entities, we do not think this is feasible or appropriate. The amendments are designed to exclude ''felons and other 'bad actors' '' from involvement in Rule 506 securities offerings, which could benefit small issuers by protecting them and their investors from bad actors and increasing investor trust in such offerings. Increased investor trust could reduce the cost of capital and create greater opportunities for small businesses to raise capital.

Likewise, with respect to potentially clarifying, consolidating, or simplifying compliance and reporting requirements, the amendments do not impose any new reporting requirements. To the extent they may be considered to create a new compliance requirement to exercise reasonable care to ascertain whether a disqualification exists with respect to any offering and to furnish a written description of preexisting triggering events, the precise steps necessary to meet that requirement will vary according to the circumstances. In general, we believe the requirement will more easily be met by small entities than by larger ones because we believe that their structures and securities offerings are generally less complex and involve fewer participants.

With respect to using performance rather than design standards, we note that the ''reasonable care'' exception is a performance standard.

With respect to exempting small entities from coverage of these final amendments, we believe such an approach would be impracticable and contrary to the requirements of Section 926. Regulation D was designed, in part, to provide exemptive relief for smaller issuers. Exempting small entities from bad actor provisions could result in a decrease in investor protection and trust in the private placement and small offerings markets, which would be contrary to the legislative intent of Section 926. We have endeavored to minimize the regulatory burden on all issuers, including small entities, while meeting our regulatory objectives, and have included a ''reasonable care'' exception and waiver authority for the Commission to give issuers and other covered persons additional flexibility with respect to the application of these amendments.

VI. Statutory Authority and Text of Amendments

We are adopting the amendments to 17 CFR Parts 230 and 239 contained in this document under the authority set forth in Sections 4(a)(2), 19 and 28 of the Securities Act, as amended,[310] and Section 926 of the Dodd-Frank Act.[311] We are adopting the amendments to 17 CFR Part 200 contained in this document under the authority of Sections 4A and 4B of the Securities Exchange Act of 1934.[312]

List of Subjects

17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies), Reporting and recordkeeping requirements.

[310] 15 U.S.C. 77d(a)(2), 77s and 77z–3.

[311] 15 U.S.C. 77d note. Although Pub. L. No. 112–106, sec. 201(a), 126 Stat. 313 (2012) is not an authority for the amendments in this release, it is being included in the instruction below for the general authority citation for Part 230 to ensure that the Code of Federal Regulations is correctly updated for purposes of the final rule also published today.

[312] 15 U.S.C. 78d–1, 78d–2.

17 CFR Parts 230 and 239

Reporting and recordkeeping requirements, Securities.

For the reasons set out above, Title 17, Chapter II of the Code of Federal Regulations is hereby amended as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

■ 1. The general authority citation for Part 200, Subpart A, continues to read, in part, as follows and the sectional authority for § 200.312 is removed.

Authority: 15 U.S.C. 77*o*, 77s, 77sss, 78d, 78d–1, 78d–2, 78w, 78*ll* (d), 78mm, 80a–37, 80b–11, and 7202, unless otherwise noted.

* * * * *

■ 2. Section 200.30–1(c) is revised to read as follows:

§ 200.30–1 Delegation of authority to Director of Division of Corporation Finance.

* * * * *

(c) With respect to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and Regulation D thereunder (§§ 230.500 through 230.508 of this chapter), to authorize the granting of applications under §§ 230.505(b)(2)(iii)(C), 230.506(d)(2)(ii), and 230.507(b) of this chapter upon the showing of good cause that it is not necessary under the circumstances that the exemption under Regulation D be denied.

* * * * *

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 3. The general authority citation for Part 230 is revised to read as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77d note, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78*o*, 78*o*–7 note, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Pub. L. No. 112–106, § 201(a), 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

■ 4. Amend § 230.145 by:

■ a. Removing the reference to ''and 4(2)'' in the second paragraph of the Preliminary Note and adding in its place ''and 4(a)(2)'';

■ b. Removing Note 1 and Note 2 following the introductory text; and

■ c. Revising the introductory text following the Preliminary Note to read as follows:

§ 230.145 Reclassification of securities, mergers, consolidations and acquisitions of assets.

* * * * *

Transactions for which statutory exemptions under the Act, including those contained in sections 3(a)(9), (10), (11) and 4(2), are otherwise available are not affected by Rule 145. Reference is made to Rule 153a (§ 230.153a of this chapter) describing the prospectus delivery required in a transaction of the type referred to in Rule 145. A reclassification of securities covered by Rule 145 would be exempt from registration pursuant to section 3(a)(9) or (11) of the Act if the conditions of either of these sections are satisfied.

* * * * *

■ 5. Amend § 230.147(b)(2) by removing the reference to ''section 4(2)'' and adding in its place ''section 4(a)(2)''.

■ 6. Amend § 230.152 by removing the reference to ''section 4(2)'' and adding in its place ''section 4(a)(2)''.

■ 7. Amend § 230.155 by removing the phrase ''Preliminary Note:'' and redesignating that note as the introductory text, and removing the reference to ''section 4(2)'' from paragraph (a) and adding in its place ''section 4(a)(2)''.

■ 8. Amend § 230.501 by:

■ a. Redesignating paragraphs (g) and (h) as paragraphs (h) and (i), respectively, and adding new paragraph (g); and

■ b. Redesignating Notes 1, 2, and 3 at the end of the section as Note 1 to § 230.501, Note 2 to § 230.501, and Note 3 to § 230.501, respectively.

The addition reads as follows:

§ 230.501 Definitions and terms used in Regulation D.

* * * * *

(g) *Final order. Final order* shall mean a written directive or declaratory statement issued by a federal or state agency described in § 230.506(d)(1)(iii) under applicable statutory authority that provides for notice and an opportunity for hearing, which constitutes a final disposition or action by that federal or state agency.

* * * * *

■ 9. Amend § 230.506 by:

■ a. Redesignating the Note following paragraph (b)(2)(i) as ''Note to paragraph (b)(2)(i)'';

■ b. Adding and reserving paragraph (c); and

■ c. Adding paragraphs (d) and (e).

The additions read as follows:

§ 230.506 Exemption for limited offers and sales without regard to dollar amount of offering.

* * * * *

(c) [Reserved]

(d) ''*Bad Actor'' disqualification.* (1) No exemption under this section shall be available for a sale of securities if the issuer; any predecessor of the issuer; any affiliated issuer; any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer; any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of such sale; any investment manager of an issuer that is a pooled investment fund; any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities; any general partner or managing member of any such investment manager or solicitor; or any director, executive officer or other officer participating in the offering of any such investment manager or solicitor or general partner or managing member of such investment manager or solicitor:

(i) Has been convicted, within ten years before such sale (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor:

(A) In connection with the purchase or sale of any security;

(B) Involving the making of any false filing with the Commission; or

(C) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(ii) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before such sale, that, at the time of such sale, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:

(A) In connection with the purchase or sale of any security;

(B) Involving the making of any false filing with the Commission; or

(C) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(iii) Is subject to a final order of a state securities commission (or an agency or officer of a state performing like functions); a state authority that supervises or examines banks, savings associations, or credit unions; a state insurance commission (or an agency or officer of a state performing like functions); an appropriate federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:

(A) At the time of such sale, bars the person from:

(*1*) Association with an entity regulated by such commission, authority, agency, or officer;

(*2*) Engaging in the business of securities, insurance or banking; or

(*3*) Engaging in savings association or credit union activities; or

(B) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such sale;

(iv) Is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(b) or 78*o*–4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(e) or (f)) that, at the time of such sale:

(A) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer or investment adviser;

(B) Places limitations on the activities, functions or operations of such person; or

(C) Bars such person from being associated with any entity or from participating in the offering of any penny stock;

(v) Is subject to any order of the Commission entered within five years before such sale that, at the time of such sale, orders the person to cease and desist from committing or causing a violation or future violation of:

(A) Any scienter-based anti-fraud provision of the federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and 17 CFR 240.10b–5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(c)(1)) and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–6(1)), or any other rule or regulation thereunder; or

(B) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e).

(vi) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;

(vii) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or Regulation A offering statement filed with the Commission that, within five years before such sale, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such sale, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or

(viii) Is subject to a United States Postal Service false representation order entered within five years before such sale, or is, at the time of such sale, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

(2) Paragraph (d)(1) of this section shall not apply:

(i) With respect to any conviction, order, judgment, decree, suspension, expulsion or bar that occurred or was issued before September 23, 2013;

(ii) Upon a showing of good cause and without prejudice to any other action by the Commission, if the Commission determines that it is not necessary under the circumstances that an exemption be denied;

(iii) If, before the relevant sale, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commission or its staff) that disqualification under paragraph (d)(1) of this section should not arise as a consequence of such order, judgment or decree; or

(iv) If the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed under paragraph (d)(1) of this section.

Instruction to paragraph (d)(2)(iv). An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

(3) For purposes of paragraph (d)(1) of this section, events relating to any affiliated issuer that occurred before the affiliation arose will be not considered disqualifying if the affiliated entity is not:

(i) In control of the issuer; or

(ii) Under common control with the issuer by a third party that was in control of the affiliated entity at the time of such events.

(e) *Disclosure of prior ''bad actor'' events.* The issuer shall furnish to each purchaser, a reasonable time prior to sale, a description in writing of any matters that would have triggered disqualification under paragraph (d)(1) of this section but occurred before September 23, 2013. The failure to furnish such information timely shall not prevent an issuer from relying on this section if the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known of the existence of the undisclosed matter or matters.

Instruction to paragraph (e). An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 10. The authority citation for part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l,* 78m, 78n, 78*o*(d), 78*o*–7 note, 78u–5, 78w(a), 78*ll,* 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

■ 11. Amend Form D (referenced in § 239.500) by revising the third indented paragraph under the heading ''Terms of Submission'' in the ''Signature and Submission'' section following Item 16 to read as follows:

Certifying that, if the issuer is claiming a Regulation D exemption for the offering, the issuer is not disqualified from relying on Regulation D for one of the reasons stated in Rule 505(b)(2)(iii) or Rule 506(d).

Note: The text of Form D does not, and the amendments will not, appear in the Code of Federal Regulations.

By the Commission.

Dated: July 10, 2013.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–16983 Filed 7–23–13; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 239 and 242

[Release No. 33–9415; No. 34–69959; No. IA–3624; File No. S7–07–12]

RIN 3235–AL34

Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: We are adopting amendments to Rule 506 of Regulation D and Rule 144A under the Securities Act of 1933 to implement Section 201(a) of the Jumpstart Our Business Startups Act. The amendment to Rule 506 permits an issuer to engage in general solicitation or general advertising in offering and selling securities pursuant to Rule 506, provided that all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify that such purchasers are accredited investors. The amendment to Rule 506 also includes a non-exclusive list of methods that issuers may use to satisfy the verification requirement for purchasers who are natural persons. The amendment to Rule 144A provides that securities may be offered pursuant to Rule 144A to persons other than qualified institutional buyers, provided that the securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe are qualified institutional buyers. We are also revising Form D to require issuers to indicate whether they are relying on the provision that permits general solicitation or general advertising in a Rule 506 offering.

Also today, in a separate release, to implement Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, we are adopting amendments to Rule 506 to disqualify issuers and other market participants from relying on Rule 506 if ''felons and other 'bad actors' '' are participating in the Rule 506 offering. We are also today, in a separate release, publishing for comment a number of proposed amendments to Regulation D, Form D and Rule 156 under the Securities Act that are intended to enhance the Commission's ability to evaluate the development of market practices in Rule 506 offerings and address certain comments made in connection with implementing Section 201(a)(1) of the Jumpstart Our Business Startups Act.

DATES: The final rule and form amendments are effective on September 23, 2013.

FOR FURTHER INFORMATION CONTACT: Charles Kwon, Special Counsel, or Ted Yu, Senior Special Counsel, Office of Chief Counsel, Division of Corporation Finance, at (202) 551–3500, or, with respect to private funds, Holly Hunter-Ceci, Senior Counsel, Chief Counsel's Office, or Alpa Patel, Senior Counsel, Investment Adviser Regulation Office, Division of Investment Management, at (202) 551–6825 or (202) 551–6787, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting amendments to Rule 144A,[1] Form D,[2] and Rules 500,[3] 501,[4] 502 [5] and 506 [6] of Regulation D [7] under the Securities Act of 1933,[8] and to Rules 101,[9] 102 [10] and 104 [11] of Regulation M [12] under the Securities Exchange Act of 1934.[13]

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I. Introduction

On August 29, 2012, we proposed rule and form amendments [14] to implement Section 201(a) of the Jumpstart Our Business Startups Act (the ''JOBS Act'').[15] Section 201(a)(1) of the JOBS Act directs the Commission, not later than 90 days after the date of enactment, to amend Rule 506 of Regulation D [16] under the Securities Act of 1933 (the ''Securities Act'') to permit general solicitation or general advertising in offerings made under Rule 506, provided that all purchasers of the securities are accredited investors.[17] Section 201(a)(1) also states that ''[s]uch rules shall require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission.'' Section 201(a)(2) of the JOBS Act directs the Commission, not later than 90 days after the date of enactment, to revise Rule 144A(d)(1) under the Securities Act [18] to permit offers of securities pursuant to Rule 144A to persons other than qualified institutional buyers (''QIBs''),[19] including by means of general solicitation or general advertising, provided that the securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe are QIBs.

The Commission originally adopted Rule 506 as a non-exclusive safe harbor under Section 4(a)(2) (formerly Section 4(2)) of the Securities Act,[20] which exempts transactions by an issuer ''not involving any public offering'' from the registration requirements of Section 5 of the Securities Act.[21] Under existing Rule 506, an issuer may sell securities,

[1] 17 CFR 230.144A.

[2] 17 CFR 239.500.

[3] 17 CFR 230.500.

[4] 17 CFR 230.501.

[5] 17 CFR 230.502.

[6] 17 CFR 230.506.

[7] 17 CFR 230.500 through 230.508.

[8] 15 U.S.C. 77a *et seq.*

[9] 17 CFR 242.101.

[10] 17 CFR 242.102.

[11] 17 CFR 242.104.

[12] 17 CFR 242.100 through 242.105.

[13] 15 U.S.C. 78a *et seq.*

[14] *See Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings,* Release No. 33–9354 (Aug. 29, 2012) [77 FR 54464 (Sept. 5, 2012)] (the ''Proposing Release'').

[15] Public Law 112–106, sec. 201(a), 126 Stat. 306, 313 (Apr. 5, 2012).

[16] The Commission adopted Regulation D in 1982 as a result of the Commission's evaluation of the impact of its rules on the ability of small businesses to raise capital. *See Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales,* Release No. 33–6389 (Mar. 8, 1982) [47 FR 11251 (Mar. 16, 1982)]. Over the years, the Commission has revised various provisions of Regulation D in order to address, among other things, specific concerns relating to facilitating capital-raising as well as abuses that have arisen under Regulation D. *See, e.g., Additional Small Business Initiatives,* Release No. 33–6996 (Apr. 28, 1993) [58 FR 26509 (May 4, 1993)] and *Revision of Rule 504 of Regulation D, the ''Seed Capital'' Exemption,* Release No. 33–7644 (Feb. 25, 1999) [64 FR 11090 (Mar. 8, 1999)].

[17] The definition of the term ''accredited investor'' that is applicable to Rule 506 is set forth in Rule 501(a) of Regulation D [17 CFR 230.501(a)] and includes any person who comes within one of the definition's enumerated categories of persons, or whom the issuer ''reasonably believes'' comes within any of the enumerated categories, at the time of the sale of the securities to that person. For natural persons, Rule 502(a) defines an accredited investor as a person: (1) Whose individual net worth, or joint net worth with that person's spouse, exceeds $1 million, excluding the value of the person's primary residence (the ''net worth test''); or (2) who had an individual income in excess of $200,000 in each of the two most recent years, or joint income with that person's spouse in excess of $300,000 in each of those years, and has a reasonable expectation of reaching the same income level in the current year (the ''income test'').

Although the Dodd-Frank Act did not change the amount of the $1 million net worth test, it did change how that amount is calculated—by excluding the value of a person's primary residence. This change took effect upon the enactment of the Dodd-Frank Act. In December 2011, we amended Rule 501 to incorporate this change into the definition of accredited investor. *See Net Worth Standard for Accredited Investors,* Release No. 33–9287 (Dec. 21, 2011) [76 FR 81793 (Dec. 29, 2011)].

[18] 17 CFR 230.144A(d)(1).

[19] The term ''qualified institutional buyer'' is defined in Rule 144A(a)(1) [17 CFR 230.144A(a)(1)] and includes specified institutions that, in the aggregate, own and invest on a discretionary basis at least $100 million in securities of issuers that are not affiliated with such institutions. Banks and other specified financial institutions must also have a net worth of at least $25 million. A registered broker-dealer qualifies as a QIB if it, in the aggregate, owns and invests on a discretionary basis at least $10 million in securities of issuers that are not affiliated with the broker-dealer.

[20] 15 U.S.C. 77d(a)(2).

[21] 15 U.S.C. 77e.

without any limitation on the offering amount, to an unlimited number of "accredited investors," as defined in Rule 501(a) of Regulation D, and to no more than 35 non-accredited investors who meet certain "sophistication" requirements.[22] The availability of Rule 506 is subject to a number of requirements [23] and is currently conditioned on the issuer, or any person acting on its behalf, not offering or selling securities through any form of "general solicitation or general advertising." [24] Although the terms "general solicitation" and "general advertising" are not defined in Regulation D, Rule 502(c) does provide examples of general solicitation and general advertising, including advertisements published in newspapers and magazines, communications broadcast over television and radio, and seminars where attendees have been invited by general solicitation or general advertising.[25] By interpretation, the Commission has confirmed that other uses of publicly available media, such as unrestricted Web sites, also constitute general solicitation and general advertising.[26] In this release, we refer to both general solicitation and general advertising as "general solicitation."

Rule 144A is a non-exclusive safe harbor exemption from the registration requirements of the Securities Act for resales of certain "restricted securities" [27] to QIBs. Resales to QIBs in accordance with the conditions of Rule 144A [28] are exempt from registration pursuant to Section 4(a)(1) (formerly Section 4(1)) of the Securities Act,[29] which exempts transactions by any person "other than an issuer, underwriter, or dealer." Although Rule 144A does not include an express prohibition against general solicitation, offers of securities under Rule 144A currently must be limited to QIBs, which has the same practical effect. By its terms, Rule 144A is available solely for resale transactions; however, since its adoption by the Commission in 1990,[30] market participants have used Rule 144A to facilitate capital-raising by issuers.[31] The term "Rule 144A offering" in this release refers to a primary offering of securities by an issuer to one or more financial intermediaries—commonly known as the "initial purchasers"—in a transaction that is exempt from registration pursuant to Section 4(a)(2) or Regulation S under the Securities Act,[32] followed by the resale of those securities by the initial purchasers to QIBs in reliance on Rule 144A.

Rule 506 offerings and Rule 144A offerings are widely used by U.S. and non-U.S. issuers to raise capital. In 2012, the estimated amount of capital (including both equity and debt) reported as being raised in Rule 506 offerings and non-asset-backed securities ("non-ABS") Rule 144A offerings by operating companies was $173 billion and $636 billion, respectively, and by pooled investment funds, such as venture capital funds, private equity funds and hedge funds, was $725 billion and $4 billion, respectively, compared to $1.2 trillion raised in registered offerings.[33] In 2011, the estimated amount of capital (including both equity and debt) reported as being raised in Rule 506 offerings and non-ABS Rule 144A offerings by operating companies was $71 billion and $438 billion, respectively, and by pooled investment funds was $778 billion and $4 billion, respectively, compared to $985 billion raised in registered offerings.[34] These data points underscore the importance of the Rule 506 and Rule 144A exemptions for issuers seeking access to the U.S. capital markets.

To implement Section 201(a) of the JOBS Act, we proposed amending Rule 506 to add new paragraph (c), under which the prohibition against general solicitation contained in Rule 502(c) would not apply, provided that all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify that such purchasers are accredited investors. In addition, we proposed amending Form D, which is a notice required to be filed with the Commission by each issuer

[22] Under Rule 506(b)(2)(ii) [17 CFR 230.506(b)(2)(ii)], each purchaser in a Rule 506 offering who is not an accredited investor must possess, or the issuer must reasonably believe immediately before the sale of securities that such purchaser possesses, either alone or with his or her purchaser representative, "such knowledge and experience in financial and business matters that he [or she] is capable of evaluating the merits and risks of the prospective investment."

[23] Offerings under Rule 506 are subject to all the terms and conditions of Rules 501 and 502. If securities are sold to any non-accredited investors, specified information requirements apply. *See* Rule 502(b) [17 CFR 230.502(b)].

[24] Rule 502(c) of Regulation D [17 CFR 230.502(c)].

[25] *Id.*

[26] *See Use of Electronic Media for Delivery Purposes,* Release No. 33–7233 (Oct. 6, 1995) [60 FR 53458, 53463–64 (Oct. 13, 1995)]; *Use of Electronic Media,* Release No. 33–7856 (Apr. 28, 2000) [65 FR 25843, 25851–52 (May 4, 2000)].

[27] "Restricted securities" are defined in Securities Act Rule 144(a)(3) [17 CFR 230.144(a)(3)] to include, in part, "[s]ecurities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering."

[28] In order for a transaction to come within existing Rule 144A, a seller must have a reasonable basis for believing that the offeree or purchaser is a QIB and must take reasonable steps to ensure that the purchaser is aware that the seller may rely on Rule 144A. Further, only securities that were not, when issued, of the same class as securities listed on a U.S. securities exchange or quoted on a U.S. automated interdealer quotation system are eligible for resale under Rule 144A. Also, the seller and a prospective purchaser designated by the seller must have the right to obtain from the issuer, upon request, certain information on the issuer, unless the issuer falls within specified categories as to which this condition does not apply.

[29] 15 U.S.C. 77d(a)(1).

[30] *See Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145,* Release No. 33–6862 (Apr. 23, 1990) [55 FR 17933 (Apr. 30, 1990)].

[31] While Rule 144A applies to resales of securities of both U.S. and non-U.S. issuers, one of the objectives of Rule 144A was to make primary offerings of non-U.S. issuers' securities available to U.S. institutions in the U.S. market through intermediaries (rather than compelling such investors to go to overseas markets) by making the private offering market in the United States more attractive to non-U.S. issuers. *See Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145,* Release No. 33–6806 (Oct. 25, 1988) [53 FR 44016 (Nov. 1, 1988)].

[32] Regulation S under the Securities Act [17 CFR 230.901 through 230.905] was adopted in 1990 as a safe harbor from the registration requirements of the Securities Act for any offer or sale of securities made outside the United States. It provides that any "offer," "offer to sell," "sell," "sale" or "offer to buy" that occurs outside the United States is not subject to the registration requirements of Section 5. Regulation S does not affect the scope or availability of the antifraud or other provisions of the Securities Act to offers and sales made in reliance on Regulation S.

[33] These statistics are based on a review of Form D electronic filings with the Commission—specifically, the "total amount sold" as reported in the filings—and data regarding other types of offerings (*e.g.,* public debt offerings and Rule 144A offerings) from Securities Data Corporation's New Issues database (Thomson Financial). *See* Vladimir Ivanov and Scott Bauguess, *Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009–2012* (July 2013) (the "Ivanov/Bauguess Study"), *available at: http://www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf.* For non-ABS Rule 144A offerings, since the databases we used to obtain the Rule 144A data do not distinguish between operating companies and funds, we classified issuers with SIC codes between 6200 and 6299 as funds, and the rest as operating companies.

The amount of capital raised through offerings under Regulation D may be larger than what is reported in Form D filings because, although the filing of a Form D is a requirement of Rule 503(a) of Regulation D [17 CFR 230.503(a)], it is not a condition to the availability of the exemptions under Regulation D. Further, once a Form D is filed, the issuer is not required to file an amendment to the filing to reflect a change that occurs after the offering terminates or a change that occurs solely with respect to certain information, such as the amount sold in the offering. For example, if the amount sold does not result in an increase in the total offering amount of more than 10% or the offering closes within a year, the filing of an amendment to the initial Form D is not required. Therefore, a Form D filed for a particular offering may not reflect the total amount of securities sold in the offering in reliance on the exemption.

[34] *See id.*

claiming a Regulation D exemption, to add a check box to indicate whether an issuer is claiming an exemption under Rule 506(c). We also proposed an amendment to Rule 144A to provide that securities sold pursuant to Rule 144A may be offered to persons other than QIBs, including by means of general solicitation, provided that the securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe are QIBs.

The comment period for the proposed rule and form amendments closed on October 5, 2012. We received over 225 comment letters on the Proposing Release, including from professional and trade associations, investor organizations, law firms, investment companies and investment advisers, members of Congress, the Commission's Investor Advisory Committee,[35] state securities regulators, issuers, individuals and other interested parties. Most of the comment letters focused on the proposed amendments to Rule 506. As discussed below, commenters were sharply divided in their views on the proposed amendments to Rule 506, whereas commenters generally supported the proposed amendments to Rule 144A and Form D.

We have reviewed and considered all of the comments that we received on the proposed rule and form amendments and on Section 201(a) of the JOBS Act.[36] We are adopting new paragraph (c) to Rule 506 as proposed, with one modification, and the amendments to Form D and to Rule 144A as proposed. We are also adopting the technical and conforming rule amendments as proposed. We discuss these amendments in detail below.

We acknowledge the concerns of some commenters that the elimination of the prohibition against general solicitation for a subset of Rule 506 offerings may affect the behavior of issuers and other market participants in ways they believe could compromise investor protection.[37] Preserving the integrity of the Rule 506(c) market and minimizing the incidence of fraud are critical objectives for the Commission in implementing Section 201(a) of the JOBS Act. We are adopting today the bad actor disqualification for Rule 506 offerings mandated by the Dodd-Frank Act, which may address some of those concerns.[38] We are also issuing a proposing release to amend Regulation D and Form D to enhance the Commission's ability to analyze the Rule 506 market and to amend Rule 156 under the Securities Act to provide guidance to private funds on the application of the antifraud provisions of the federal securities laws to their sales literature.[39] Upon the effectiveness of Rule 506(c), the Commission staff will monitor developments in the market for Rule 506(c) offerings so as to be able to undertake a review of market practices in Rule 506(c) offerings, including the steps taken by issuers and other market participants to verify that the purchasers of the offered securities are accredited investors, as well as the impact of the amendments to Rule 506 on capital formation.

II. Final Amendments to Rule 506 and Form D

A. Eliminating the Prohibition Against General Solicitation

Section 4(a)(2) of the Securities Act exempts transactions by an issuer ''not involving any public offering.'' An issuer relying on Section 4(a)(2) is restricted in its ability to make public communications to attract investors for its offering because public advertising is incompatible with a claim of exemption under Section 4(a)(2).[40] As noted above, Rule 506 currently conditions the availability of the safe harbor under Section 4(a)(2) on the issuer, or any person acting on its behalf, not offering or selling securities through any form of general solicitation.[41] Section 201(a)(1) of the JOBS Act directs the Commission to amend Rule 506 to provide that the prohibition against general solicitation contained in Rule 502(c) shall not apply to offers and sales of securities made pursuant to Rule 506, as so amended, provided that all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify their status as accredited investors.

This mandate affects only Rule 506, and not Section 4(a)(2) offerings in general,[42] which means that even after the effective date of Rule 506(c), an issuer relying on Section 4(a)(2) outside of the Rule 506(c) exemption will be restricted in its ability to make public communications to solicit investors for its offering because public advertising will continue to be incompatible with a claim of exemption under Section 4(a)(2). We are amending Rule 500(c) of Regulation D accordingly to make this clear.[43] Congress' directive in Section 201(a)(1) of the JOBS Act, and not Section 4(a)(2) of the Securities Act or our interpretation of Section 4(a)(2), is the reason that Rule 506, ''as revised pursuant to [Section 201(a)(1)], shall continue *to be treated as* a regulation issued under section 4[(a)](2) of the Securities Act of 1933'' (emphasis added).[44] Similarly, securities issued in Rule 506(c) offerings are deemed to be ''covered securities'' for purposes of

[35] The SEC Investor Advisory Committee (''Investor Advisory Committee'') was established in April 2012 pursuant to Section 911 of the Dodd-Frank Wall Street Reform and Consumer Protection Act [Pub. L. 111–203, sec. 911, 124 Stat. 1376, 1822 (July 21, 2010)] (the ''Dodd-Frank Act'') to advise the Commission on regulatory priorities, the regulation of securities products, trading strategies, fee structures, the effectiveness of disclosure, initiatives to protect investor interests and to promote investor confidence and the integrity of the securities marketplace. The Dodd-Frank Act authorizes the Investor Advisory Committee to submit findings and recommendations for review and consideration by the Commission.

[36] To facilitate public input on JOBS Act rulemaking before the issuance of rule proposals, the Commission invited members of the public to make their views known on various JOBS Act initiatives in advance of any rulemaking by submitting comment letters to the Commission's Web site at *http://www.sec.gov/spotlight/jobsactcomments.shtml*. The comment letters relating to Section 201(a) of the JOBS Act submitted in response to this invitation are located at *http://www.sec.gov/comments/jobs-title-ii/jobs-title-ii.shtml*. The comment letters submitted in response to the Proposing Release are located at *http://www.sec.gov/comments/s7-07-12/s70712.shtml*. Many commenters submitted comment letters both before and after the issuance of the Proposing Release. Dated comment letters refer to those submitted before the issuance of the Proposing Release or by commenters that submitted multiple letters.

[37] *See, e.g.,* letters from Investor Advisory Committee; North American Securities Administrators Association, Inc. (''NASAA''); Consumer Federation of America (''Consumer Federation'').

[38] *Disqualification of Felons and Other ''Bad Actors'' from Rule 506 Offerings,* Release No. 33–9414 (July 10, 2013) (the ''Bad Actor Release'').

[39] *See Amendments to Regulation D, Form D and Rule 156,* Release No. 33–9416 (July 10, 2013).

[40] *See Non-Public Offering Exemption,* Release No. 33–4552 (Nov. 6, 1962) [27 FR 11316 (Nov. 16, 1962)].

[41] *See* Rule 502(c) and Rule 506(b)(1) of Regulation D [17 CFR 230.506(b)(1)]. The failure to comply with Rule 502(c) is deemed to be significant to the offering as a whole, which means that an issuer cannot rely on the ''insignificant deviation'' relief in Rule 508 of Regulation D for violations of Rule 502(c). *See* Rule 508(a)(2) [17 CFR 230.508(a)(2)].

[42] In this regard, we also note that bills that would have amended Section 4(a)(2) directly, rather than requiring the Commission to amend Rule 506, to permit the use of general solicitation were introduced and considered by Congress, but were not enacted. *See* Access to Capital for Job Creators, H.R. 2940, 112th Cong., 1st Sess. (2011) (proposing to amend Section 4(a)(2) by adding the phrase ''whether or not such transactions involve general solicitation or general advertising''); Access to Capital for Job Creators, S.1831, 112th Cong., 1st Sess. (2011) (same).

[43] As revised, Rule 500(c) reads as follows: ''Attempted compliance with any rule in Regulation D does not act as an exclusive election; the issuer can also claim the availability of any other applicable exemption. For instance, an issuer's failure to satisfy all the terms and conditions of rule 506*(b)* (§ 230.506*(b)*) shall not raise any presumption that the exemption provided by section 4*(a)*(2) of the Act is not available.'' (additions italicized).

[44] Section 201(a)(1) of the JOBS Act.

Section 18(b)(4)(E) of the Securities Act,[45] only by virtue of Section 201(a)(1) of the JOBS Act.

1. Proposed Rule Amendment

To implement the mandated rule change, we proposed new Rule 506(c), which would permit the use of general solicitation to offer and sell securities under Rule 506, provided that the following conditions are satisfied:

- All terms and conditions of Rule 501[46] and Rules 502(a)[47] and 502(d)[48] must be satisfied;
- all purchasers of securities must be accredited investors; and
- the issuer must take reasonable steps to verify that the purchasers of the securities are accredited investors.

Offerings under proposed Rule 506(c) would not be subject to the requirement to comply with Rule 502(c), which contains the prohibition against general solicitation. While we proposed Rule 506(c) to enable issuers to use general solicitation in Rule 506 offerings, we also preserved, in current Rule 506(b), the existing ability of issuers to conduct Rule 506 offerings subject to the prohibition against general solicitation.

2. Comments on the Proposed Rule Amendment

Commenters were sharply divided in their views on the proposed amendment to Rule 506. Commenters who supported the proposed amendment to Rule 506 stated that Rule 506(c), if adopted, would assist issuers, particularly early stage and smaller issuers, in raising capital by allowing them to solicit investments from a larger pool of investors.[49] These commenters generally approved of the flexibility afforded by the manner in which we proposed to implement Rule 506(c)'s verification requirement,[50] as further discussed below, and supported retaining, in its current form, the ability of issuers under existing Rule 506(b) to conduct Rule 506 offerings subject to the prohibition against general solicitation.[51] A number of commenters stated that they supported the availability of Rule 506(c) for private funds pursuant to the Commission's guidance in the Proposing Release.[52]

Other commenters opposed the proposed amendment to Rule 506 in its entirety or in part. Many of these commenters expressed concern that the proposed amendment, if adopted, would increase the risk of fraudulent and abusive Rule 506 offerings and asserted that additional investor safeguards are necessary under Rule 506(c).[53] A number of these commenters urged the Commission to adopt rules concerning bad actor disqualifications for Rule 506 offerings, as required by Section 926 of the Dodd-Frank Act.[54] Other commenters recommended that the Commission amend the definition of ''accredited investor'' by raising the income and net worth thresholds for natural persons or by implementing other measures of financial sophistication.[55] Some commenters stated that the Commission should condition the availability of the Rule 506(c) exemption on the filing of Form D or require the advance filing of Form D, or both.[56] Other commenters argued that the Commission should adopt specific standards or requirements that would govern the content and/or manner of general solicitations in Rule 506(c) offerings, particularly with respect to advertising by private funds.[57] A number of commenters urged the Commission to require that the materials used to generally solicit investors in Rule 506(c) offerings be filed with or furnished to either the Commission or to FINRA.[58]

A number of commenters requested that the Commission provide transitional guidance with respect to ongoing offerings under existing Rule 506 that commenced before the effectiveness of Rule 506(c).[59] For example, in some situations, the initial closings in these offerings may have already occurred, and could have included non-accredited investors pursuant to offering procedures that would not have involved any form of general solicitation.[60] Several commenters suggested that the Commission clarify that an issuer would be entitled to conduct the portion of the

[45] 15 U.S.C. 77r(b)(4)(E). This means that state blue sky registration requirements do not apply to securities offered or sold in Rule 506(c) offerings.

[46] Rule 501 sets forth definitions for the terms used in Regulation D, such as ''accredited investor.''

[47] Rule 502(a) addresses the question of integration by providing a six-month safe harbor from integration for successive Regulation D offerings and a five-factor framework to apply in cases in which the six-month safe harbor is not available.

[48] Rule 502(d) provides that, for resale purposes, securities acquired in a Regulation D offering, except as provided in Rule 504(b)(1), have the status of securities acquired in a transaction under Section 4(a)(2) of the Securities Act. Rule 144(a)(3)(ii) [17 CFR 230.144(a)(3)(ii)] defines ''restricted securities'' as securities ''acquired from the issuer that are subject to the resale limitations of § 230.502(d) under Regulation D. . . .'' Separately, Section 201(b) of the JOBS Act added Section 4(b) of the Securities Act, which provides that ''[o]ffers and sales exempt under [Rule 506 as amended pursuant to Section 201 of the JOBS Act] shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation.'' Thus, securities acquired under new Rule 506(c) would also meet the definition of ''restricted securities'' under Rule 144(a)(3)(i) [17 CFR 230.144(a)(3)(i)] (''[s]ecurities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering'').

[49] *See, e.g.,* letters from Biotechnology Industry Organization (''BIO''); National Small Business Association (''NSBA'').

[50] *See* letters from Linklaters LLP (''Linklaters'') (stating that a ''straightforward, focused rule that provides issuers with the flexibility to continue to adapt to market practice is the best way to realize the spirit and intent of the Jumpstart Our Business Startups Act''); BlackRock (stating that ''[o]verall, we believe that the Proposed Rule is in accordance with the intent of Congress and will facilitate the formation of capital''); Securities Regulation Committee, Business Law Section of the New York State Bar Association (''SRC of NYSBA'').

[51] *See, e.g.,* letters from the Federal Regulation of Securities Committee, Business Law Section of the American Bar Association (''ABA Fed. Reg. Comm.''); Angel Capital Association (''ACA'') (Sept. 27, 2012); The CrowdFund Intermediary Regulatory Advocates (''CFIRA''); Investment Program Association (''IPA''); Montgomery & Hansen, LLP (''Montgomery & Hansen''); NSBA; Committee on Securities Regulation of the New York City Bar Association (''NYCBA''); Sullivan & Cromwell LLP (''S&C''); Securities Industry and Financial Markets Association (''SIFMA'') and The Financial Services Roundtable (''FSR'') (Oct. 5, 2012).

[52] *See, e.g.,* letters from BlackRock; Dukas Public Relations (''Dukas''); Forum for U.S. Securities Lawyers in London; Hedge Fund Association (''HFA''); Investment Adviser Association (''IAA''); Managed Funds Association (''MFA'') (Sept. 28, 2012); NYCBA; SRC of NYSBA. In the Proposing Release, we stated that private funds that engage in general solicitation under proposed Rule 506(c) would not be precluded from relying on the exclusions from the definition of ''investment company'' set forth in Section 3(c)(1) and Section 3(c)(7) of the Investment Company Act of 1940.

[53] *See, e.g.,* letters from AARP; AFL–CIO and Americans for Financial Reform (''AFR''); Sen. Levin; CFA Institute; Council of Institutional Investors (''CII''); Consumer Federation; Fund Democracy, Inc. (''Fund Democracy''); Office of the Secretary of the Commonwealth of Massachusetts Securities Division (''Massachusetts Securities Division''); NASAA.

[54] Public Law 111–203, sec. 926, 124 Stat. 1376, 1851 (July 21, 2010) (to be codified at 15 U.S.C. 77d note). *See, e.g.,* letters from AFL–CIO and AFR; Consumer Federation; Fund Democracy; Commissioner of Securities, State of Hawaii (''Hawaii Commissioner of Securities''); Investor Advisory Committee; Rep. Waters; Commissioner of Securities, State of Missouri (''Missouri Commissioner of Securities''); NASAA.

[55] *See, e.g.,* letters from AARP; AFL–CIO and AFR; BetterInvesting; CFA Institute; Consumer Federation; Investor Advisory Committee; Investment Company Institute (''ICI''); Rep. Waters; Massachusetts Securities Division (July 2, 2012).

[56] *See, e.g.,* letters from AARP; AFL–CIO and AFR; Consumer Federation; Hawaii Commissioner of Securities; Investor Advisory Committee; Massachusetts Securities Division (July 2, 2012); Missouri Commissioner of Securities; Commissioner of Securities and Insurance, State of Montana (''Montana Commissioner of Securities''); NASAA; Ohio Division of Securities.

[57] *See, e.g.,* letters from Sen. Levin; Consumer Federation; ICI; Independent Directors Council (''IDC''); Rep. Waters; Montana Commissioner of Securities; NASAA.

[58] *See, e.g.,* letters from AFL–CIO and AFR; Investor Advisory Committee; ICI; Massachusetts Securities Division (July 2, 2012).

[59] *See* letters from ABA Fed. Reg. Comm.; Forum for U.S. Securities Lawyers in London; S&C; IPA.

[60] *See* letter from ABA Fed. Reg. Comm.

offering following the effectiveness of Rule 506(c) in accordance with the requirements of new Rule 506(c), without the portion of the offering occurring after the rule's effectiveness affecting the portion of the offering that was completed prior to the rule's effectiveness.[61]

3. Final Rule Amendment

After considering the comments, we are adopting Rule 506(c) as proposed, with one modification. Under new Rule 506(c), issuers can offer securities through means of general solicitation, provided that they satisfy all of the conditions of the exemption.[62] These conditions are:

- all terms and conditions of Rule 501 and Rules 502(a) and 502(d) must be satisfied;[63]
- all purchasers of securities must be accredited investors;[64] and
- the issuer must take reasonable steps to verify that the purchasers of the securities are accredited investors.[65]

Issuers relying on Rule 506(c) for their offerings will not be subject to the prohibition against general solicitation found in Rule 502(c).[66] In addition and as further discussed below, in response to comments from a wide range of commenters asking for greater certainty with respect to satisfying the verification requirement, we are also including in Rule 506(c) a non-exclusive list of methods that issuers may use to verify the accredited investor status of natural persons.

Issuers will continue to have the ability under Rule 506(b) to conduct Rule 506 offerings subject to the prohibition against general solicitation. As we noted in the Proposing Release, offerings under existing Rule 506(b) represent an important source of capital for issuers of all sizes, and we believe that the continued availability of existing Rule 506(b) will be important for those issuers that either do not wish to engage in general solicitation in their Rule 506 offerings (and become subject to the requirement to take reasonable steps to verify the accredited investor status of purchasers) or wish to sell privately to non-accredited investors who meet Rule 506(b)'s sophistication requirements. Retaining the safe harbor under existing Rule 506(b) may also be beneficial to investors with whom an issuer has a pre-existing substantive relationship.[67] In this regard, we do not believe that Section 201(a) requires the Commission to modify Rule 506 to impose any new requirements on offers and sales of securities that do not involve general solicitation. Therefore, the amendment to Rule 506 we are adopting today does not amend or modify the requirements relating to existing Rule 506(b).

Finally, with respect to transition matters, for an ongoing offering under Rule 506 that commenced before the effective date of Rule 506(c), the issuer may choose to continue the offering after the effective date in accordance with the requirements of either Rule 506(b) or Rule 506(c). If an issuer chooses to continue the offering in accordance with the requirements of Rule 506(c), any general solicitation that occurs after the effective date will not affect the exempt status of offers and sales of securities that occurred prior to the effective date in reliance on Rule 506(b).

B. Reasonable Steps To Verify Accredited Investor Status

Section 201(a)(1) of the JOBS Act mandates that our amendment to Rule 506 require issuers using general solicitation in Rule 506 offerings ''to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission.'' As noted in the Proposing Release, we believe that the purpose of the verification mandate is to address concerns, and reduce the risk, that the use of general solicitation in Rule 506 offerings could result in sales of securities to investors who are not, in fact, accredited investors.[68]

1. Proposed Rule Amendment

To implement the verification mandate of Section 201(a)(1), we proposed to condition the Rule 506(c) exemption on the requirement that issuers using general solicitation ''take reasonable steps to verify'' that the purchasers of the offered securities are accredited investors. As proposed, whether the steps taken are ''reasonable'' would be an objective determination by the issuer (or those acting on its behalf), in the context of the particular facts and circumstances of each purchaser and transaction. Under this principles-based approach, issuers would consider a number of factors when determining the reasonableness of the steps to verify that a purchaser is an accredited investor, such as:

- The nature of the purchaser and the type of accredited investor that the purchaser claims to be;
- the amount and type of information that the issuer has about the purchaser; and
- the nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount.

These factors would be interconnected, and the information gained by looking at these factors would help an issuer assess the reasonable likelihood that a potential purchaser is an accredited investor, which would, in turn, affect the types of steps that would be reasonable to take to verify a purchaser's accredited investor status.

In the Proposing Release, we considered providing a list of specified methods for satisfying the verification requirement, which was suggested by some commenters on Section 201(a) prior to the issuance of the Proposing Release.[69] We expressed concern that, in

[61] *See* letters from ABA Fed. Reg. Comm.; S&C (stating that ''[w]e believe that such issuers should be allowed, upon effectiveness of the final rule, to use the new Rule 506(c) exemption and use general solicitation for the remaining portion of their offerings, provided that they satisfy the requirements of Rule 506(c) going forward.'').

[62] We also note that broker-dealers participating in offerings in conjunction with issuers relying on Rule 506(c) would continue to be subject to FINRA rules regarding communications with the public, which, among other things, (1) generally require all member communications to be based on principles of fair dealing and good faith, to be fair and balanced, and to provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry or service; and (2) prohibit broker-dealers from making false, exaggerated, unwarranted, promissory or misleading statements or claims in any communications. *See* FINRA Rule 2210.

[63] New Rule 506(c)(1).

[64] New Rule 506(c)(2)(i).

[65] New Rule 506(c)(2)(ii).

[66] Offerings under Rule 506(c) will also not be subject to the information requirements in Rule 502(b) for non-accredited investors, because all purchasers in Rule 506(c) offerings are required to be accredited investors.

[67] *See* Release No. 33–7856, at 25852 (noting that ''one method of ensuring that general solicitation is not involved is to establish the existence of a 'pre-existing, substantive relationship''' and that ''there may be facts and circumstances in which a third party, other than a registered broker-dealer, could established a 'pre-existing, substantive relationship' sufficient to avoid a 'general solicitation' '').

[68] *See, e.g., Markup of H.R. 2940, Access to Capital for Job Creators Act,* Subcommittee on Capital Markets and Government Sponsored Enterprises, House Financial Services Committee, 112th Cong. (Oct. 5, 2011) (remarks of Rep. Waters, explaining that she is introducing the amendment that requires issuers to take reasonable steps to verify accredited investor status because ''we must take steps to ensure that those folks are indeed sophisticated''); 157 Cong. Rec. H7291 (daily ed. Nov. 3, 2011) (remarks of Rep. Maloney (same)); 157 Cong. Rec. H7294 (daily ed. Nov. 3, 2011) (remarks of Rep. Lee (same)).

[69] *See* letters from MFA (June 26, 2012) (suggesting that the Commission publish a non-exclusive list of the types of third-party evidence that an investor could provide to establish accredited investor status, in conjunction with certifying that he or she is an accredited investor); NASAA (July 3, 2012) (recommending that the Commission set forth non-exclusive safe harbors to specify the types of actions that would be deemed

designating such a list—for example, by setting forth particular types of information that issuers may rely upon as conclusive means of verifying accredited investor status—there may be circumstances where such information will not actually verify accredited investor status or where issuers may unreasonably overlook or disregard other information indicating that a purchaser is not, in fact, an accredited investor. Also, we were concerned that requiring issuers to use specified methods of verification would be impractical, burdensome and potentially ineffective in light of the numerous ways in which a purchaser can qualify as an accredited investor, as well as the potentially wide range of verification issues that may arise, depending on the nature of the purchaser and the facts and circumstances of a particular Rule 506(c) offering. Even if the list of specified methods was not mandatory, but rather, constituted a non-exclusive list, we were concerned that a non-exclusive list of specified methods could be viewed by market participants as, in effect, required methods, in which compliance with at least one of the enumerated methods could be viewed as necessary in all circumstances to demonstrate that the verification requirement has been satisfied, thereby eliminating the flexibility that proposed Rule 506(c) was intended to provide.

We requested comment in the Proposing Release on our proposed principles-based method and its effectiveness in limiting sales of securities in Rule 506(c) offerings to only accredited investors. We also requested comment on possible alternative approaches for implementing the verification mandate of Section 201(a)(1), such as a rule that specifies mandatory methods for verifying accredited investor status or a non-exclusive list of verification methods that would function as a safe harbor for compliance with the verification requirement.

2. Comments on the Proposed Rule Amendment

Commenters expressed a wide range of views on the proposed approach to the verification requirement in Rule 506(c). Some commenters commended the Commission for proposing a flexible, principles-based standard for verification.[70] For example, one commenter stated that the Commission's proposed approach would provide issuers with the flexibility to develop tailored, reliable and cost-effective procedures for verification.[71] A number of commenters stated that the discussion in the Proposing Release of the factors that issuers may take into account in verifying accredited investor status would assist issuers in assessing the reasonableness of their verification processes.[72] Other commenters asserted that not requiring issuers to use certain specified methods to verify a purchaser's accredited investor status would permit advancements in verification methods over time.[73] Some commenters expressed support for the Commission's proposal that accredited investor status may be verified through an attestation or certification by a third party, provided that the issuer has a reasonable basis to rely on such third-party verification.[74]

Other commenters opposed the Commission's proposed approach, for various reasons. A number of these commenters opposed the proposed verification standard because, in their view, self-certification by itself should be sufficient to satisfy the verification requirement.[75] Some commenters opposed the proposed verification standard because it did not prescribe specific verification methods, which they believed is required in order to satisfy the verification mandate in Section 201(a).[76] One commenter stated that the Commission should deem the verification requirement to be satisfied if all purchasers in a Rule 506(c) offering are in fact accredited investors.[77] Another commenter stated that verification of accredited investor status should not be a condition of the Rule 506(c) exemption when the purchaser is actually an accredited investor.[78]

Commenters expressed differing views on whether the Commission should include a non-exclusive list of methods in proposed Rule 506(c) for satisfying the verification requirement. Many commenters, encompassing a wide range of perspectives (*e.g.,* state government officials, law firms, investor organizations, professional and trade associations, and individuals), urged the Commission to provide such a non-exclusive list.[79] A number of these commenters cited the lack of legal certainty that the verification requirement has been satisfied in any given situation as the reason why, in their view, the Commission should include a non-exclusive list of verification methods in Rule 506(c).[80] In contrast, other commenters stated that the Commission should not include a non-exclusive list of verification methods in Rule 506(c), arguing that such a list could be viewed by market participants as the required verification methods, which would thereby undermine the flexibility of the Commission's proposed approach.[81]

If there were to be a non-exclusive list of verification methods, commenters expressed a range of views on what should be included in such a list, such as verification by certain third parties or through tax returns and third-party documentary proof such as Forms W–2, Forms 1099, bank statements, brokerage account statements, tax assessment valuations and appraisal reports.[82] With

''reasonable steps to verify'' for three types of accredited investors: natural persons who purport to satisfy the income test; natural persons who purport to satisfy the net worth test; and entities who purport to meet one of the other tests set forth in Rule 501(a)).

[70] *See, e.g.,* letters from HFA; MFA (Sept. 28, 2012); BIO; ABA Fed. Reg. Comm.; IAA; Linklaters; NYCBA; SRC of NYSBA; SIFMA and FSR (Oct. 5, 2012); Artivest Holdings, Inc. (''Artivest'').

[71] *See* letter from SIFMA and FSR (Oct. 5, 2012).

[72] *See, e.g.,* letters from SRC of NYSBA; S&C; SIFMA and FSR (Oct. 5, 2012); IAA.

[73] *See* letters from ACA (Sept. 27, 2012); CFIRA.

[74] *See, e.g.,* letters from IAA; SIFMA and FSR (Oct. 5, 2012); Tannenbaum Helpern Syracuse & Hirschtritt LLP (''Tannenbaum Helpern''). A number of commenters noted that the availability of third-party verification could address investors' privacy and security concerns in providing information to an issuer. *See, e.g.,* letters from L. Neumann; NSBA. One commenter urged the Commission not to limit third-party verification providers to certain types of entities. *See* letter from Tannenbaum Helpern. One commenter suggested the possibility of requiring investors to self-certify as to accredited investor status under penalty of perjury. *See* letter from NSBA.

[75] *See, e.g.,* letters from C. Hague; G. Brooks; Golenbock Eiseman Assor Bell & Peskoe LLP; P. Christenson; W. Johnson.

[76] *See, e.g.,* letters from AFL–CIO and AFR; Sen. Levin; Consumer Federation; Fund Democracy; Rep. Waters; Massachusetts Securities Division; The Options Clearing Corporation (''OCC''); Ohio Division of Securities.

[77] *See* letter from IPA.

[78] *See* letter from S. Keller.

[79] *See, e.g.,* letters from ACA (Sept. 27, 2012 and Dec. 11, 2012); BIO; CFIRA; HFA; Hawaii Commissioner of Securities; IAA; Investor Advisory Committee (stating that the ''facts and circumstances'' based approach proposed by the Commission does not do enough either to ensure only accredited investors purchase in the offering or to provide issuers with the certainty they need to develop appropriate procedures); J. McLaughlin; MFA (Sept. 28, 2012); Montana Commissioner of Securities; NASAA; Tufts Stephenson & Kasper, LLP; Nevada Securities Division; OCC; Ohio Division of Securities; Pepper Hamilton LLP (''Pepper Hamilton''); Plexus Consulting Group, LLC (''Plexus Consulting Group''); Small Business Investor Association (''SBIA''); South Carolina Securities Commissioner; Virginia Division of Securities.

[80] *See, e.g.,* letters from ACA (Sept. 27, 2012 and Dec. 11, 2012); HFA; Investor Advisory Committee; OCC.

[81] *See, e.g.,* letters from ABA Fed. Reg. Comm.; Artivest; BlackRock; S&C; SIFMA and FSR (Oct. 5, 2012).

[82] *See, e.g.,* letters from B. Methven; L. Neumann; NASAA.

respect to the types of third parties that could provide verification services, commenters named registered brokers-dealers,[83] banks and other financial institutions,[84] registered investment advisers,[85] certified financial planners,[86] attorneys,[87] and accountants.[88] Other commenters suggested including in a non-exclusive list of verification methods self-certification, plus a minimum investment amount such as $25,000,[89] $100,000,[90] $250,000,[91] $500,000[92] or $1,000,000.[93]

In contrast, one commenter argued that the ability to satisfy a minimum investment amount would not necessarily mean a person is an accredited investor, but rather, that the investor could be ''over-concentrated in the investment.''[94] Another commenter stated that the verification requirement should not be deemed satisfied simply because an issuer possesses general information about the average compensation in the investor's profession or workplace.[95]

Several commenters stated that there should be a ''grandfather'' provision from the verification mandate for an issuer's existing investors who purchased securities in a Rule 506(b) offering prior to the effective date of Rule 506(c),[96] and one commenter proposed to limit the scope of any grandfather provision to only existing accredited investors.[97] Two of these commenters reasoned that, as issuers are prohibited from engaging in general solicitation activities in Rule 506(b) offerings, their existing investors did not purchase securities in offerings that used general solicitation, and any future investments by these investors would be based on their pre-existing relationship with the issuers, and not as a result of general solicitation.[98] Therefore, a grandfather provision would be appropriate because the purpose of the verification mandate in Section 201(a) of the JOBS Act is to require the verification of the accredited investor status of only prospective purchasers who come to the issuer ''as a result of'' the issuer's general solicitation activities.[99] One commenter stated that, for existing investors, a ''reaffirmation representation'' of accredited investor status received shortly before or simultaneously with any subsequent investment should be sufficient for Rule 506(c) purposes.[100]

3. Final Rule Amendment

After considering the comments and as directed by Section 201(a) of the JOBS Act, we are adopting as a condition of new Rule 506(c) the requirement that issuers take ''reasonable steps to verify'' that purchasers of the offered securities are accredited investors. This requirement is separate from and independent of the requirement that sales be limited to accredited investors, and must be satisfied even if all purchasers happen to be accredited investors.[101] We are also including in Rule 506(c) a non-exclusive list of methods that issuers may use to satisfy the verification requirement. As discussed above, a number of commenters urged the Commission to provide greater certainty for issuers that the verification requirement has been satisfied by providing a non-exclusive list of methods for verifying the accredited investor status of purchasers in Rule 506(c) offerings. Upon further consideration, we have concluded that a general requirement that issuers take ''reasonable steps to verify'' that the purchasers are accredited investors, combined with a non-exclusive list of verification methods that are deemed to meet this requirement, would maintain the flexibility of the verification standard while providing additional clarity and certainty that this requirement has been satisfied if one of the specified methods is used. We have specified methods for verifying the accredited investor status of natural persons because we believe that the potential for uncertainty and the risk of participation by non-accredited investors is highest in offerings involving natural persons as purchasers.

a. Principles-Based Method of Verification

Under Rule 506(c), issuers are required to take reasonable steps to verify the accredited investor status of purchasers. Consistent with the Proposing Release, whether the steps taken are ''reasonable'' will be an objective determination by the issuer (or those acting on its behalf), in the context of the particular facts and circumstances of each purchaser and transaction. Among the factors that issuers should consider under this facts and circumstances analysis are:

- the nature of the purchaser and the type of accredited investor that the purchaser claims to be;
- the amount and type of information that the issuer has about the purchaser; and
- the nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount.

As noted in the Proposing Release, these factors are interconnected and are intended to help guide an issuer in assessing the reasonable likelihood that a purchaser is an accredited investor—which would, in turn, affect the types of steps that would be reasonable to take to verify a purchaser's accredited investor status. After consideration of the facts and circumstances of the purchaser and of the transaction, the more likely it appears that a purchaser qualifies as an accredited investor, the fewer steps the issuer would have to take to verify accredited investor status, and vice versa. For example, if the terms of the offering require a high minimum investment amount and a purchaser is able to meet those terms, then the likelihood of that purchaser satisfying the definition of accredited investor may be sufficiently high such that, absent any facts that indicate that the purchaser is not an accredited investor, it may be reasonable for the issuer to take fewer steps to verify or, in certain cases, no additional steps to verify accredited investor status other than to confirm that the purchaser's cash

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[83] *See, e.g.,* letters from Massachusetts Securities Division (July 2, 2012); J. McLaughlin; NASAA; OCC; Pepper Hamilton; Plexus Consulting Group; SBIA.

[84] *See* letter from Massachusetts Securities Division (July 2, 2012).

[85] *See, e.g.,* letters from Plexus Consulting Group; SBIA.

[86] *See, e.g.,* letters from Plexus Consulting Group; NSBA (stating that ''if there must be some kind of enhanced verification, we recommend that a certification by the investor's attorney, CPA, certified financial advisor or other licensed professional should be sufficient'').

[87] *Id.*

[88] *Id.*

[89] *See* letter from Montgomery & Hansen.

[90] *See* letters from B. Methven; SBIA (provided the issuer is a small business investment company (''SBIC'') or a fund that has been authorized to apply to be an SBIC by the U.S. Small Business Administration).

[91] *See* letter from J. Joseph (stating that ''[s]ome may feel that that number is $25,000, perhaps $100,000 but certainly at $250,000 there should be no question that the investor is properly qualified and accredited'').

[92] *See* letter from MFA (Sept. 28, 2012) (stating that ''[i]n considering the appropriate minimum investment level, we have previously recommended a minimum investment level of 50% of the accredited investor net worth or total asset thresholds, currently $500,000 for an individual, and $2,500,000 for an entity'').

[93] *See* letter from Pepper Hamilton.

[94] Letter from Massachusetts Securities Division (July 2, 2012).

[95] *See* letter from NASAA.

[96] *See* letters from MFA (Sept. 28, 2012); IAA; Tannenbaum Helpern.

[97] *See* letter from Pepper Hamilton.

[98] *See* letters from MFA (Sept. 28, 2012); Tannenbaum Helpern.

[99] *See* letter from Tannenbaum Helpern.

[100] *See* letter from Pepper Hamilton.

[101] This will avoid diminishing the incentive for issuers to undertake the reasonable verification steps envisioned by the statute.

investment is not being financed by a third party.

Regardless of the particular steps taken, because the issuer has the burden of demonstrating that its offering is entitled to an exemption from the registration requirements of Section 5 of the Securities Act,[102] it will be important for issuers and their verification service providers to retain adequate records regarding the steps taken to verify that a purchaser was an accredited investor.

Nature of the Purchaser. In determining the reasonableness of the steps to verify accredited investor status, an issuer should consider the nature of the purchaser of the offered securities. The definition of ''accredited investor'' in Rule 501(a) includes natural persons and entities that come within any of eight enumerated categories in the rule, or that the issuer reasonably believes come within one of those categories, at the time of the sale of securities to that natural person or entity. Some purchasers may be accredited investors based on their status, such as:

- a broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934 (the ''Exchange Act''); [103] or
- an investment company registered under the Investment Company Act of 1940 (the ''Investment Company Act'') or a business development company as defined in Section 2(a)(48) of that Act.[104]

Some purchasers may be accredited investors based on a combination of their status and the amount of their total assets, such as:

- a plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $5 million; [105] or
- an Internal Revenue Code (''IRC'') Section 501(c)(3) organization, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $5 million.[106]

Natural persons may be accredited investors based on either their net worth or their annual income, as follows:

- a natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1 million, excluding the value of the person's primary residence; [107] or
- a natural person who had an individual income in excess of $200,000 in each of the two most recent years, or joint income with that person's spouse in excess of $300,000 in each of those years, and has a reasonable expectation of reaching the same income level in the current year.[108]

As Rule 501(a) sets forth different categories of accredited investors, an issuer should recognize that the steps that will be reasonable to verify whether a purchaser is an accredited investor will vary depending on the type of accredited investor that the purchaser claims to be. For example, the steps that may be reasonable to verify that an entity is an accredited investor by virtue of being a registered broker-dealer—such as by going to FINRA's BrokerCheck Web site [109]—will necessarily differ from the steps that may be reasonable to verify whether a natural person is an accredited investor.

As we stated in the Proposing Release, the verification of natural persons as accredited investors may pose greater practical difficulties as compared to other categories of accredited investors, particularly for natural persons claiming to be accredited investors based on the net worth test. These practical difficulties likely will be exacerbated by privacy concerns about the disclosure of personal financial information. As between the net worth test and the income test for natural persons, we recognize that commenters have suggested that it might be more difficult for an issuer to obtain information about the assets and liabilities that determine a person's net worth—particularly the liabilities—than it would be to obtain information about a person's annual income,[110] although there could be privacy concerns with respect to either test. The question of what type of information would be sufficient to constitute reasonable steps to verify accredited investor status under the particular facts and circumstances will also depend on other factors, as described below.

Information about the Purchaser. The amount and type of information that an issuer has about a purchaser can also be a significant factor in determining what additional steps would be reasonable to take to verify the purchaser's accredited investor status. The more information an issuer has indicating that a prospective purchaser is an accredited investor, the fewer steps it may have to take, and vice versa.[111] Examples of the types of information that issuers could review or rely upon—any of which might, depending on the circumstances, in and of themselves constitute reasonable steps to verify a purchaser's accredited investor status—include, without limitation:

- publicly available information in filings with a federal, state or local regulatory body—for example, without limitation:
  - the purchaser is a named executive officer of an Exchange Act registrant, and the registrant's proxy statement discloses the purchaser's compensation; or
  - the purchaser claims to be an IRC Section 501(c)(3) organization with $5 million in assets, and the organization's Form 990 series return filed with the Internal Revenue Service discloses the organization's total assets; [112]
- third-party information that provides reasonably reliable evidence that a person falls within one of the enumerated categories in the accredited investor definition—for example, without limitation:
  - the purchaser is a natural person and provides copies of pay stubs for the two most recent years and the current year; or
  - specific information about the average compensation earned at the purchaser's workplace by persons at the level of the purchaser's seniority is publicly available; or
- verification of a person's status as an accredited investor by a third party, provided that the issuer has a

[102] *SEC* v. *Ralston Purina,* 346 U.S. 119, 126 (1953) (''Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable.'').

[103] *See* 17 CFR 230.501(a)(1).

[104] *See id.*

[105] *See id.*

[106] *See* 17 CFR 230.501(a)(3).

[107] *See* 17 CFR 230.501(a)(5).

[108] *See* 17 CFR 230.501(a)(6).

[109] This Web site is available at: *http://www.finra.org/Investors/ToolsCalculators/BrokerCheck/.*

[110] *See* letters from NASAA (stating that ''[v]erification of net worth is more challenging because an individual could provide proof of assets but not liabilities.''); P. Sigelman (Sept. 28, 2012).

[111] If an issuer has actual knowledge that the purchaser is an accredited investor, then the issuer will not have to take any steps at all.

[112] Such an organization is required to make the Form 990 series returns available for public inspection. *See* Internal Revenue Service, *Public Disclosure and Availability of Exempt Organizations Returns and Applications: Documents Subject to Public Disclosure,* available at: *http://www.irs.gov/Charities-&-Non-Profits/Public-Disclosure-and-Availability-of-Exempt-Organizations-Returns-and-Applications:-Documents-Subject-to-Public-Disclosure* (last reviewed or updated April 28, 2013).

reasonable basis to rely on such third-party verification.[113]

Nature and Terms of the Offering. The nature of the offering—such as the means through which the issuer publicly solicits purchasers—may be relevant in determining the reasonableness of the steps taken to verify accredited investor status. An issuer that solicits new investors through a Web site accessible to the general public, through a widely disseminated email or social media solicitation, or through print media, such as a newspaper, will likely be obligated to take greater measures to verify accredited investor status than an issuer that solicits new investors from a database of pre-screened accredited investors created and maintained by a reasonably reliable third party. We believe that an issuer will be entitled to rely on a third party that has verified a person's status as an accredited investor, provided that the issuer has a reasonable basis to rely on such third-party verification. We do not believe that an issuer will have taken reasonable steps to verify accredited investor status if it, or those acting on its behalf, required only that a person check a box in a questionnaire or sign a form, absent other information about the purchaser indicating accredited investor status.

The terms of the offering will also affect whether the verification methods used by the issuer are reasonable. We continue to believe that there is merit to the view that a purchaser's ability to meet a high minimum investment amount could be a relevant factor to the issuer's evaluation of the types of steps that would be reasonable to take in order to verify that purchaser's status as an accredited investor. By way of example, the ability of a purchaser to satisfy a minimum investment amount requirement that is sufficiently high such that only accredited investors could reasonably be expected to meet it, with a direct cash investment that is not financed by the issuer or by any third party, could be taken into consideration in verifying accredited investor status.

Commenters suggested a number of alternative approaches to implementing the verification mandate. Some commenters urged us to adopt a requirement that prescribes specific methods of verification that issuers must use, either because they believed such methods are needed for issuers seeking clarity on how to comply with this condition of Rule 506(c)[114] or because they believed that such methods are needed to maintain investor protection.[115] We have decided not to take such an approach. As we stated in the Proposing Release, we believe that, at present, requiring issuers to use specified methods of verification will be impractical and potentially ineffective in light of the numerous ways in which a purchaser can qualify as an accredited investor, as well as the potentially wide range of verification issues that may arise, depending on the nature of the purchaser and the facts and circumstances of a particular Rule 506(c) offering. We are also concerned that a prescriptive rule that specifies required verification methods could be overly burdensome in some cases, by requiring issuers to follow the same steps, regardless of their particular circumstances, and ineffective in others, by requiring steps that, in the particular circumstances, would not actually verify accredited investor status.

We believe that the approach we are adopting appropriately addresses the concerns underlying the verification mandate by obligating issuers to take reasonable steps to verify that the purchasers are accredited investors, but not requiring them to follow uniform verification methods that may be ill-suited or unnecessary to a particular offering or purchaser in light of the facts and circumstances. We also expect that such an approach will give issuers and market participants the flexibility to adopt different approaches to verification depending on the circumstances, to adapt to changing market practices, and to implement innovative approaches to meeting the verification requirement, such as the development of reliable third-party databases of accredited investors and verification services. In addition, we anticipate that many practices currently used by issuers in connection with existing Rule 506 offerings will satisfy the verification requirement for offerings pursuant to Rule 506(c).

b. Non-Exclusive Methods of Verifying Accredited Investor Status

In addition to adopting a principles-based method of verification, we are including in Rule 506(c) four specific non-exclusive methods of verifying accredited investor status for natural persons that, if used, are deemed to satisfy the verification requirement in Rule 506(c); provided, however, that none of these methods will be deemed to satisfy the verification requirement if the issuer or its agent has knowledge that the purchaser is not an accredited investor.[116] While the principles-based method of verification is intended to provide an issuer with the flexibility to address the particular facts and circumstances surrounding its offering, we appreciate the view of some commenters that the final rule should include a non-exclusive list of specific verification methods for natural persons that may be relied upon by those issuers seeking greater certainty that they satisfy the rule's verification requirement.[117] Accordingly, we are adding a non-exclusive list of specific verification methods to supplement our principles-based framework for verifying accredited investor status.[118] Issuers are not required to use any of the methods discussed below, and can apply the reasonableness standard directly to the specific facts and circumstances presented by the offering and the investors.[119]

[113] For example, in the future, services may develop that verify a person's accredited investor status for purposes of new Rule 506(c) and permit issuers to check the accredited investor status of possible investors, particularly for web-based Rule 506 offering portals that include offerings for multiple issuers. This third-party service, as opposed to the issuer itself, could obtain appropriate documentation or otherwise take reasonable steps to verify accredited investor status. Several commenters, in fact, have recommended that the Commission take action to facilitate the ability of issuers to rely on third parties to perform the necessary verification. *See* letters from NASAA (July 3, 2012) (recommending that the Commission allow an issuer to obtain the necessary verification through registered broker-dealers, provided that there are independent liability provisions for failure to adequately perform the verification); Massachusetts Securities Division (July 2, 2012) (urging the Commission to adopt as a safe harbor or best practice the use of an independent party, such as a broker-dealer, bank, or other financial institution, that would verify the accredited investor status of purchasers). One commenter, however, expressed concerns that some of the Web sites that currently offer lists of accredited investors could be used to facilitate fraud, noting that some offer lists based on ''ethnicity, gender, and lifestyle—presumably to make [it] easier for scammers to relate to marks—and ominously, 'seniors.' '' Letter from I. Moscovitz and J. Maxfield (June 27, 2012).

[114] *See, e.g.,* letter from Handler Thayer, LLP.

[115] *See, e.g.,* letters from AARP; CII.

[116] Because an issuer must have a reasonable belief that the purchaser is an accredited investor, the issuer could not form such reasonable belief if it has knowledge that the purchaser is not an accredited investor. See Section II.C of this release for a discussion of the reasonable belief standard in the definition of accredited investor in Rule 501(a).

[117] *See, e.g.,* letters from ACA (Sept. 27, 2012 and Dec. 11, 2012); Investor Advisory Committee; MFA (Sept. 28, 2012).

[118] Information and documentation collected for these verification purposes may be subject to federal and/or state privacy and data security requirements. *See, e.g.,* Regulation S–P [17 CFR 248.1–248.30] (implementing notice requirements and restrictions on a financial institution's ability to disclose nonpublic personal information about customers); *Privacy of Consumer Financial Information (Regulation S–P),* Release No. 34–42974 (June 22, 2000) [65 FR 40334 (June 29, 2000)].

[119] We expect that many issuers will conduct Rule 506(c) offerings in reliance on the principles-based method of verification, in light of its flexibility and efficiency.

First, in verifying whether a natural person is an accredited investor on the basis of income, an issuer is deemed to satisfy the verification requirement in Rule 506(c) by reviewing copies of any Internal Revenue Service (''IRS'') form that reports income, including, but not limited to, a Form W–2 (''Wage and Tax Statement''), Form 1099 (report of various types of income), Schedule K–1 of Form 1065 (''Partner's Share of Income, Deductions, Credits, etc.''), and a copy of a filed Form 1040 (''U.S. Individual Income Tax Return''),[120] for the two most recent years, along with obtaining a written representation from such person that he or she has a reasonable expectation of reaching the income level necessary to qualify as an accredited investor during the current year. In the case of a person who qualifies as an accredited investor based on joint income with that person's spouse, an issuer would be deemed to satisfy the verification requirement in Rule 506(c) by reviewing copies of these forms for the two most recent years in regard to, and obtaining written representations from, both the person and the spouse.

Second, in verifying whether a natural person is an accredited investor on the basis of net worth, an issuer is deemed to satisfy the verification requirement in Rule 506(c) by reviewing one or more of the following types of documentation, dated within the prior three months,[121] and by obtaining a written representation from such person that all liabilities necessary to make a determination of net worth have been disclosed. In the case of a person who qualifies as an accredited investor based on joint net worth with that person's spouse, an issuer would be deemed to satisfy the verification requirement in Rule 506(c) by reviewing such documentation in regard to, and obtaining representations from, both the person and the spouse. For assets: Bank statements, brokerage statements and other statements of securities holdings, certificates of deposit, tax assessments and appraisal reports issued by independent third parties are deemed to be satisfactory; and for liabilities: A consumer report (also known as a credit report) from at least one of the nationwide consumer reporting agencies is required.[122] Commenters did not provide examples of any other type of documentation that would, in our view, adequately evidence liabilities.[123] We recognize that it will be difficult for an issuer to determine whether it has a complete picture of a natural person's liabilities, and therefore, for purposes of this method, consistent with the suggestions of some commenters, we are requiring a consumer report and a written representation from such person that all liabilities necessary to make a determination of net worth have been disclosed.

Third, an issuer is deemed to satisfy the verification requirement in Rule 506(c) by obtaining a written confirmation from a registered broker-dealer, an SEC-registered investment adviser, a licensed attorney, or a certified public accountant that such person or entity has taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that such purchaser is an accredited investor.[124] While third-party confirmation by one of these parties will be deemed to satisfy the verification requirement in Rule 506(c), depending on the circumstances, an issuer may be entitled to rely on the verification of accredited investor status by a person or entity other than one of these parties, provided that any such third party takes reasonable steps to verify that purchasers are accredited investors and has determined that such purchasers are accredited investors, and the issuer has a reasonable basis to rely on such verification.

Fourth, with respect to any natural person who invested in an issuer's Rule 506(b) offering as an accredited investor prior to the effective date of Rule 506(c) and remains an investor of the issuer, for any Rule 506(c) offering conducted by the same issuer, the issuer is deemed to satisfy the verification requirement in Rule 506(c) with respect to any such person by obtaining a certification by such person at the time of sale that he or she qualifies as an accredited investor.

We are including the first three methods in our non-exclusive list of methods that are deemed to satisfy the verification requirement in Rule 506(c) because we believe that there will likely be few instances in which they would not constitute reasonable steps to verify accredited investor status. With respect to the verification method for the income test, there are numerous penalties for falsely reporting information in an Internal Revenue Service form, and these forms are filed with the Internal Revenue Service for purposes independent of investing in a Rule 506(c) offering. Similarly, we believe that the various forms of documentation set forth in the verification method for the net worth test ordinarily are generated for reasons other than to invest in a Rule 506(c) offering (with the possible exception of appraisal reports) and, in combination with a consumer report and a written representation from the investor regarding his or her liabilities, constitute sufficiently reliable evidence that such person's net worth exceeds $1 million, excluding the value of the person's primary residence. With respect to the third-party verification method, we have included written confirmations from certain third parties in our non-exclusive list of verification methods because these third parties are subject to various regulatory and/or licensing requirements. Registered broker-dealers[125] and SEC-registered investment advisers[126] are regulated by

[120] A person could provide a redacted version of an Internal Revenue Service form so as to disclose only information about annual income and to avoid disclosure of personally identifiable information, such as a Social Security number, or other information that would not be relevant to the determination of a person's annual income.

[121] A person could provide redacted versions of these documents so as to disclose only information about the amounts of assets and liabilities and to avoid disclosure of personally identifiable information, such as a Social Security number, or other information that would not be relevant to the determination of a person's net worth.

[122] We note that the Fair Credit Reporting Act (''FCRA'') [15 U.S.C. 1681 *et seq.*] requires each of the nationwide consumer reporting agencies to provide a person with a free copy of his or her consumer report, upon request, once every 12 months. In addition, the FCRA permits third parties to access individual consumer reports with the written permission of the individual.

[123] One commenter suggested that the Commission ''require the issuer to obtain a list of liabilities from the investor, which would include a sworn statement that all material liabilities are disclosed.'' Letter from NASAA. Another commenter noted that liabilities can be cross checked against UCC 1 filings, bankruptcy information on Public Access to Court Electronic Records (PACER), and credit reports. *See* letter from P. Sigelman (Sept. 28, 2012).

[124] For purposes of this method, a licensed attorney must be in good standing under the laws of the jurisdictions in which the attorney is admitted to practice law, and a certified public accountant must be in good standing under the laws of the place of the accountant's residence or principal office.

[125] Registered broker-dealers are subject to a comprehensive system of oversight by the Commission as well as FINRA. In particular, registered broker-dealers, among other things, must maintain and preserve specified books and records, develop effective supervisory policies and controls, and comply with FINRA rules regarding registration and qualification requirements for their associated persons as well as general and specific conduct rules. In addition, registered broker-dealers are subject to examinations by both FINRA and Commission staff.

[126] An investment adviser must register with the Commission unless it is prohibited from registering under Section 203A of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3a] (the ''Advisers Act'') or is exempt from registration under Advisers Act Section 203 [15 U.S.C. 80b–3]. Investment advisers that are prohibited from registering with the Commission instead may be subject to regulation by the states, but the antifraud provisions of the

Continued

the Commission; and in the United States, attorneys and certified public accountants are licensed at the state level and are subject to rules of professional conduct [127] as well as, to the extent they appear or practice before the Commission in any way, to the Commission's Rules of Practice.[128]

We are including the fourth method in our non-exclusive list of methods that are deemed to satisfy the verification requirement in Rule 506(c) because we acknowledge that existing accredited investors who purchased securities in an issuer's Rule 506(b) offering prior to the effective date of Rule 506(c) would presumably participate in any subsequent offering by the same issuer conducted pursuant to Rule 506(c) based on their pre-existing relationships with the issuer. Accordingly, for these existing investors who were accredited investors in a Rule 506(b) offering prior to the effective date of Rule 506(c), a self-certification at the time of sale that he or she is an accredited investor will be deemed to satisfy the verification requirement in Rule 506(c). This provision does not extend to existing investors in an issuer who were not accredited investors in a Rule 506(b) offering that was conducted prior to the effective date of Rule 506(c).

While we have not adopted the recommendations of commenters who believe that even more prescriptive verification requirements are needed, we do recognize the general concern regarding possible misuse of the new Rule 506(c) exemption to sell securities to those who are not qualified to participate in the offering. We will closely monitor and study the development of verification practices by issuers, securities intermediaries and others by undertaking a review of whether such practices are, in fact, resulting in the exclusion of non-accredited investors from participation in these offerings, and the impact of compliance with this verification requirement on investor protection and capital formation.

C. Reasonable Belief That All Purchasers Are Accredited Investors

In the Proposing Release, we noted that a number of commenters had raised concerns that the language of Section 201(a) of the JOBS Act could be interpreted as precluding the use of the ''reasonable belief'' standard in the definition of ''accredited investor'' in Rule 501(a) in determining whether a purchaser is an accredited investor, such that an issuer's determination as to whether a purchaser is an accredited investor is subject to an absolute, rather than a ''reasonable belief,'' standard.[129] In their view, issuers may be more reluctant to use general solicitation in Rule 506 offerings if their determinations as to whether a purchaser is an accredited investor are subject to an absolute standard. Other commenters had interpreted the difference in the statutory language used in Section 201(a)(1) and Section 201(a)(2) [130] as indicating Congress' intent that the Commission ''raise the 'reasonable belief' standard for Rule 506 offerings . . . .'' [131]

Commenters on the Proposing Release were divided on the Commission's interpretation that the reasonable belief standard in Rule 501(a) applies to offerings under Rule 506(c). Several commenters supported this interpretation; [132] and other commenters opposed this interpretation.[133]

We are reaffirming the view that we expressed on this issue in the Proposing Release. In our view, the difference in the language between Section 201(a)(1) and Section 201(a)(2) reflects only the differing manner in which the reasonable belief standard was included in the respective rules at the time they were adopted, and does not represent a Congressional intent to eliminate the existing reasonable belief standard in Rule 501(a) or for Rule 506 offerings.[134] We note that the definition of accredited investor remains unchanged with the enactment of the JOBS Act and includes persons that come within any of the listed categories of accredited investors, as well as persons that the issuer reasonably believes come within any such category.

Further, as discussed in the Proposing Release, we continue to recognize that a person could provide false information or documentation to an issuer in order to purchase securities in an offering made under new Rule 506(c). Thus, even if an issuer has taken reasonable

Advisers Act continue to apply to them. *See* Advisers Act Sections 203A(b) and 206 [15 U.S.C. 80b–3(a), 15 U.S.C. 80b–6]. SEC-registered investment advisers are subject to examinations by Commission staff.

[127] Attorneys are subject to state standards for professional competence and ethical conduct, such as those based on the American Bar Association (''ABA'') Model Rules of Professional Conduct, which have been adopted by most states in the United States. For example, Rule 4.1 of the ABA Model Rules of Professional Conduct prohibits an attorney from knowingly making a false statement of material fact or law to a third person or failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. Accountants are also subject to state standards for professional competence and ethical conduct, such as those based on the AICPA Code of Professional Conduct. *See* AICPA Code of Professional Conduct ET 201.01, 202.01; *see also, e.g.,* The Uniform Accountancy Act (5th ed. 2007), available at: *http://www.aicpa.org/Advocacy/State/StateContactInfo/uaa/DownloadableDocuments/UAA_Fifth_Edition_January_2008.pdf.*

The Commission recognizes that there may be particular considerations a certified public accountant would need to take into account to comply with applicable professional standards for attestation engagements to provide a report that constitutes a confirmation in the context of this rule.

[128] *See* Rule 102(e) of the Rules of Practice [17 CFR 201.102(e)] (The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing and practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter: (i) Not to possess the requisite qualifications to represent others; or (ii) To be lacking in character or integrity or to have engaged in unethical or improper professional conduct; or (iii) To have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.).

[129] *See, e.g.,* letters from ABA Fed. Reg. Comm. (Apr. 30, 2012); BlackRock (May 3, 2012); NYCBA (May 4, 2012); W. Sjostrom, Jr. (Apr. 14, 2012).

[130] Section 201(a)(2) of the JOBS Act, which calls for amendments to Rule 144A, specifically refers to a ''reasonable belief'' standard as to whether a purchaser is a QIB, whereas Section 201(a)(1) does not mention a similar ''reasonable belief'' standard with respect to the amendments to Rule 506.

[131] Letter from Fund Democracy (May 24, 2012). *See also* letter from Massachusetts Securities Division (July 2, 2012).

[132] *See* letters from ABA Fed. Reg. Comm. (stating that it ''strongly support[s] the continued inclusion of the reasonable belief standard in the accredited investor definition, whether the offering is conducted under Rule 506(b) without general solicitation, or under Rule 506(c) with general solicitation''); IAA; MFA (Sept. 28, 2012) (stating that ''[e]liminating the 'reasonable belief' standard in the definition of accredited investor would preclude issuers from relying on Rule 506(c)'' and that, if this were the case, ''[i]ssuers would not engage in general solicitation and Section 201 would fail in its intended purposes to modernize the securities laws''); NSBA; NYCBA; P. Rutledge.

[133] *See* letters from AFL–CIO and AFR (stating that ''the legislative record reflects unmistakable congressional intent that securities sold through general solicitation and advertising under Rule 506 be sold only to accredited investors, not individuals issuers reasonably believe to be accredited investors''); Sen. Levin (stating that the ''Proposed Rule also creates, with no statutory basis, an alternative to the 'reasonable steps' requirement in the statute by stating that issuers may engage in a general solicitation or advertising so long as they 'reasonably believe' that the investors to be addressed will be accredited''); Consumer Federation (stating that a reasonable belief standard ''is in direct conflict with the statutory mandate that all investors in offerings sold through general solicitation and advertising be accredited investors and that the Commission specify methods issuers must follow to ensure that this is the case''); Fund Democracy (arguing that ''Congress intentionally chose not to make such [a reasonable belief] exception to the mandate that Rule 506 purchasers be accredited investors'').

[134] Both Rule 506 and Rule 144A currently provide for a reasonable belief standard regarding the eligibility of an investor to participate in an offering under the respective rules, but they reach that result in different ways. For Rule 506, the Commission chose to include the reasonable belief standard within the Rule 501(a) definition of ''accredited investor''; for Rule 144A, the Commission chose to include the standard as a condition, in paragraph (d)(1), to the use of the exemption.

steps to verify that a purchaser is an accredited investor, it is possible that a person nevertheless could circumvent those measures.[135] If a person who does not meet the criteria for any category of accredited investor purchases securities in a Rule 506(c) offering, we believe that the issuer will not lose the ability to rely on Rule 506(c) for that offering, so long as the issuer took reasonable steps to verify that the purchaser was an accredited investor and had a reasonable belief that such purchaser was an accredited investor at the time of sale.[136]

D. Form D Check Box for Rule 506(c) Offerings

Form D is the notice of an offering of securities conducted without registration under the Securities Act in reliance on Regulation D.[137] Under Rule 503 of Regulation D, an issuer offering or selling securities in reliance on Rule 504, 505 or 506 must file a notice of sales on Form D with the Commission for each new offering of securities no later than 15 calendar days after the first sale of securities in the offering. Form D is currently organized around 16 numbered ''items'' or categories of information. The information required to be provided in a Form D filing includes basic identifying information, such as the name of the issuer of the securities and the issuer's year and place of incorporation or organization; information about related persons (executive officers, directors, and promoters); the exemption or exemptions being claimed for the offering; and factual information about the offering, such as the duration of the offering, the type of securities offered and the total offering amount.

1. Proposed Form Amendment

We proposed revising Form D to add a separate field or check box for issuers to indicate whether they are claiming an exemption under Rule 506(c). Item 6 of Form D currently requires the issuer to identify the claimed exemption or exemptions for the offering from among Rule 504's paragraphs and subparagraphs, Rule 505, Rule 506 and former Section 4(5), as applicable. Under the proposal, a new check box in Item 6 of Form D would require issuers to indicate specifically whether they are relying on the Rule 506(c) exemption. In addition, the current check box for ''Rule 506'' would be renamed ''Rule 506(b),'' and the current check box for ''Section 4(5)'' would be renamed ''Section 4(a)(5)'' to update the reference to former Section 4(5) of the Securities Act.

We explained in the Proposing Release that this revision would provide additional information needed to assist our efforts to analyze the use of general solicitation in Rule 506(c) offerings and the size of this offering market. The information would also help us to look into the practices that may develop to satisfy the verification requirement, which would assist us in assessing the effectiveness of various verification practices in identifying and excluding non-accredited investors from participation in Rule 506(c) offerings.

2. Comments on the Proposed Form Amendment

Most commenters who expressed a view on the proposed checkbox in Form D supported the addition of this checkbox for issuers to indicate whether they are relying on Rule 506(c) for their offerings.[138] Only one commenter opposed the proposed checkbox.[139] A number of commenters recommended that the Commission include additional information requirements in Form D for Rule 506(c) offerings, beyond a checkbox to indicate reliance on Rule 506(c).[140] Some commenters asked for confirmation that issuers may check *both* the Rule 506(b) box and the Rule 506(c) box in a Form D under certain circumstances.[141]

3. Final Form Amendment

We are adopting the revision to Form D as proposed. Issuers conducting Rule 506(c) offerings must indicate that they are relying on the Rule 506(c) exemption by marking the new check box in Item 6 of Form D. Further, as proposed, the current check box for ''Rule 506'' will be renamed ''Rule 506(b),'' and the current check box for ''Section 4(5)'' will be renamed ''Section 4(a)(5).''

We are of the view that an issuer will not be permitted to check both boxes at the same time for the same offering. We remind issuers that once a general solicitation has been made to the purchasers in the offering,[142] an issuer is precluded from making a claim of reliance on Rule 506(b), which remains subject to the prohibition against general solicitation, for that same offering.

E. Specific Issues for Private Funds

Private funds, such as hedge funds, venture capital funds and private equity funds, typically rely on Section 4(a)(2) and Rule 506 to offer and sell their interests without registration under the Securities Act.[143] In addition, private funds generally rely on one of two exclusions from the definition of ''investment company'' under the Investment Company Act—Section

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[135] We note that several federal courts have been unsympathetic to attempts by investors who represented that they were accredited investors at the time of the sale of securities to subsequently disavow those representations in order to pursue a cause of action under the federal securities laws. *See, e.g., Wright* v. *Nat'l Warranty Co.,* 953 F.2d 256 (6th Cir. 1991) (rejecting the plaintiffs' argument that Rule 505 was unavailable because the plaintiffs ''specifically warranted and represented in the subscription agreement . . . that they were accredited investors''); *Goodwin Properties, LLC* v. *Acadia Group, Inc.,* No. 01–49–P–C, 2001 U.S. Dist. LEXIS 9975 (D. Me. 2001) (noting that the plaintiffs ''provided the defendants with reason to believe that they were accredited investors as defined by 17 C.F.R. § 230.501(a)'' and stating that therefore ''[t]hey cannot now disavow those representations in order to support their claims against the defendants''); *Faye L. Roth Revocable Trust* v. *UBS Painewebber Inc.,* 323 F. Supp. 2d 1279 (S.D. Fla. 2004) (stating that the plaintiffs ''cannot disavow their representations that they were accredited investors'' and concluding that there was no material dispute that the offering complied with Regulation D).

[136] Our views regarding an issuer's ability to maintain the exemption for a Rule 506(c) offering notwithstanding the fact that not all purchasers meet the criteria for any category of accredited investor are consistent with our views regarding the effect of attempts by prospective investors to circumvent the requirement in Regulation S that offers and sales be made only to non-U.S. persons. *See Statement of the Commission Regarding Use of Internet Web sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore,* Release No. 33–7516 (Mar. 23, 1998) [63 FR 14806 (Mar. 27, 1998)] (''In our view, if a U.S. person purchases securities or investment services notwithstanding adequate procedures reasonably designed to prevent the purchase, we would not view the Internet offer after the fact as having been targeted at the United States, absent indications that would put the issuer on notice that the purchaser was a U.S. person.'').

[137] Form D also applies to offerings conducted using the Section 4(a)(5) exemption. The Commission adopted Form D when it adopted Regulation D in 1982. Release No. 33–6389 (adopting Form D as a replacement for Forms 4(6), 146, 240 and 242).

[138] *See, e.g.,* letters from MFA (Sept. 28, 2012); BIO; S&C; Tannenbaum Helpern; ABA Fed. Reg. Comm.; IAA; SIFMA and FSR (Oct. 5, 2012); SRC of NYSBA.

[139] Letter from J. McLaughlin (stating that ''Section 201(a)(1) does not authorize the Commission to impose a separate Form D filing requirement on issuers who choose to engage in general solicitation'').

[140] *See, e.g.,* letters from AARP; AFL–CIO and AFR; Consumer Federation; Investor Advisory Committee; NASAA; Massachusetts Securities Division (July 2, 2012); Fund Democracy.

[141] *See* letters from J. Gross; NYCBA; IAA.

[142] That is, the purchasers became interested in the offering because of, or through, the general solicitation, and not through some means other than the general solicitation, such as through a substantive, pre-existing relationship with the company or direct contact by the company or its agents outside of the general solicitation. *See Revisions of Limited Offering Exemptions in Regulation D,* Release No. 33–8828 (Aug. 3, 2007) [72 FR 45116, 45129 (Aug. 10, 2007)].

[143] *See, e.g., Implications of the Growth of Hedge Funds, Staff Report to the Securities and Exchange Commission* (Sept. 2003) (''Staff Report on Hedge Funds''), available at: *http://www.sec.gov/news/studies/hedgefunds0903.pdf.*

3(c)(1) [144] and Section 3(c)(7) [145]—which enables them to be excluded from substantially all of the regulatory provisions of that Act.[146] Private funds are precluded from relying on either of these two exclusions if they make a public offering of their securities.[147] Section 3(c)(1) excludes from the definition of ''investment company'' any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than 100 beneficial owners,[148] and which is not making and does not presently propose to make a public offering of its securities. Section 3(c)(7) excludes from the definition of ''investment company'' any issuer whose outstanding securities are owned exclusively by persons who, at the time of acquisition of such securities, are ''qualified purchasers,'' [149] and which is not making and does not at that time propose to make a public offering of its securities.

Section 201(a)(1) of the JOBS Act directs the Commission to eliminate the prohibition against general solicitation for a new category of Rule 506 offerings, and makes no specific reference to private funds. Section 201(b) of the JOBS Act also provides that ''[o]ffers and sales exempt under [Rule 506, as revised pursuant to Section 201(a)] shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation.'' We historically have regarded Rule 506 transactions as non-public offerings for purposes of Sections 3(c)(1) and 3(c)(7).[150] As we stated in the Proposing Release and reaffirm here, the effect of Section 201(b) is to permit private funds to engage in general solicitation in compliance with new Rule 506(c) without losing either of the exclusions under the Investment Company Act.

A few commenters argued that Section 201(b) does not permit private funds to engage in general solicitation under proposed Rule 506(c) without losing their exclusions under the Investment Company Act.[151] In our view, although Section 201(b) does not explicitly reference the meaning of ''public offering'' under the Investment Company Act, it clearly states that ''[o]ffers and sales exempt under [Rule 506, as revised pursuant to Section 201(a)] shall not be deemed public offerings under the *Federal securities laws* as a result of general advertising or general solicitation'' (emphasis added). As the Investment Company Act is a federal securities law, the effect of Section 201(b) is to permit offers and sales of securities under Rule 506(c) by private funds relying on the exclusions from the definition of ''investment company'' under Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act.

Some commenters expressed concerns about private funds engaging in general solicitation under proposed Rule 506(c).[152] Other commenters, however, supported the removal of the prohibition against general solicitation in Rule 506(c) offerings with respect to private funds,[153] with some commenters stating that the removal of the ban would bring greater transparency to the private fund industry and allow managers of private funds to communicate more effectively with the public and prospective investors.[154]

Some commenters who were concerned about private funds engaging in general solicitation recommended that we impose additional conditions on private funds that rely on Rule 506(c). In particular, a number of commenters believed that private funds engaging in general solicitation should be subject to some form of content and/or other restrictions, and suggested potential methods.[155] For example, some believed that, in order to engage in general solicitation, private funds should be held to performance and advertising standards that are analogous to mutual fund standards.[156] One of these commenters suggested that the Commission develop rules tailored to the ways private funds calculate and present investment performance, rather than extending mutual fund performance rules to private funds.[157] Some made other suggestions, such as

[144] 15 U.S.C. 80a–3(c)(1).

[145] 15 U.S.C. 80a–3(c)(7).

[146] We also refer in this release to ''pooled investment funds'' because that term is used in Form D. Issuers that rely on Section 3(c)(1) or 3(c)(7) of the Investment Company Act are a subset of pooled investment funds.

[147] *See also* Section 202(a)(29) of the Advisers Act [15 U.S.C. 80b–2(a)(29)] (defining a ''private fund'' as an issuer that would be an investment company under the Investment Company Act, but for Sections 3(c)(1) or 3(c)(7) of that Act). Many ABS issuers also rely on the exclusions contained in Sections 3(c)(1) or 3(c)(7) of the Investment Company Act. These ABS issuers frequently participate in Rule 144A offerings.

[148] *See also* Rule 3c–5 under the Investment Company Act [17 CFR 270.3c–5] (providing that the section's limit of 100 beneficial owners does not include ''knowledgeable employees,'' as defined in the rule).

[149] *See* Section 2(a)(51) of the Investment Company Act [15 U.S.C. 80a–2(a)(51)] and the rules there under. *See Also* Rule 3c–5 under the Investment Company Act (excluding ''knowledgeable employees'' from the determination of whether all of the outstanding securities of the fund relying on Section 3(c)(7) are owned exclusively by qualified purchasers).

[150] *See* Release No. 33–6389 (noting that the ''Commission regards rule 506 transactions as non-public offerings for purposes of the definition of 'investment company' in section 3(c)(1) of the Investment Company Act''); *Privately Offered Investment Companies,* Release No. IC–22597 (Apr. 3, 1997) [62 FR 17512 (Apr. 9, 1997)], at n. 5 (noting that the ''Commission believes that section 3(c)(7)'s public offering limitation should be interpreted in the same manner as the limitation in section 3(c)(1)'').

[151] *See* letter from Fund Democracy (stating that ''Section 201(b) refers only to Rule 506; it makes no reference to the meaning of 'public offering' under the Investment Company Act exemptions''). *See also* letter from AFL–CIO and AFR.

[152] *See, e.g.,* letters from A. La Rosa; A. Pierwola; AFL–CIO and AFR; C. Erickson; Consumer Federation; E. Guthrie; F. Urling; Fund Democracy; J. Clark; K. Pesson; M. Gessford; M. Trail; M. Zartler; R. Dunn; S. Johnston; W. Cunningham.

[153] *See, e.g.,* letters from BlackRock; Dukas; Forum for U.S. Securities Lawyers in London; HFA; IAA; MFA (Sept. 28, 2012); NYCBA; SRC of NYSBA.

[154] *See, e.g.,* letters from Dukas; HFA.

[155] *See, e.g.,* letters from ICI; AFL–CIO and AFR; C. Corn; Sen. Levin (stating that ''Congress did not contemplate removing the general solicitation ban—without retaining any limitations on forms of solicitation—for private investment vehicles''); Consumer Federation; D. Kronheim; D. Smith; Fund Democracy; G. Lavy; G. Morin; Investor Advisory Committee; IDC; J. Sanders; Rep. Waters; NASAA; P. Turney; Sens. Reed, Levin, Durbin, Harkin, Lautenberg, Franken and Akaka.

[156] *See, e.g.,* letters from C. Corn; Sen. Levin (noting that ''[a]lready, the Commission has determined that the manner and substance of solicitation and advertising for investments in registered investment companies deserves significant regulatory oversight. Many of those same concerns apply to investments in private investment vehicles. Accordingly, the Commission should impose analogous protections for investments in private funds.''); Consumer Federation (stating that ''[s]hort of an outright prohibition on general solicitation and advertising by private funds, the Commission should at the very least adopt clear standards for the reporting of performance and fees by private funds, and delay their eligibility from engaging in general solicitation and advertising until such time as those standards are in place,'' including a requirement to include in private fund advertisements ''a clear, prominent warning that they are not mutual funds and carry special risks.''); D. Kronheim; D. Smith; Fund Democracy (noting that an alternative would be to ''apply mutual fund advertising and valuation rules to hedge funds that engage in [general solicitation and advertising] (and, in any case, require standardized performance and fee reporting for all hedge funds), and require explicit, large-font disclaimers that hedge funds are not mutual funds and present special risks.''); G. Lavy; ICI (recommending content restrictions on private fund advertising at least as extensive as those currently applicable to mutual funds (*e.g.,* disclaimers regarding the performance figures or measures displayed in any advertisement), with a prohibition on use of performance advertising until the Commission can develop a new rule regarding such advertising); IDC; NASAA (stating that ''because the investment strategies of private funds are typically more opaque, risky, and illiquid than those of mutual funds, private fund advertisements should be subject to restrictions that are comparable to the rules for mutual funds.''); P. Turney.

[157] *See* letter from ICI (arguing that the antifraud provisions in Section 206(4) of the Advisers Act [15 U.S.C. 80b–6(4)] and Rule 206(4)–8 thereunder [17 CFR 275.206(4)–8] would not be enough to protect investors because these advertisements will be presented before accredited and non-accredited investors at the same time).

requiring each private fund relying on Rule 506(c) to disclose that the private fund is not registered with the Commission and should not be confused with a registered fund, such as a mutual fund.[158] With respect to private funds sold through broker-dealers subject to FINRA's rules of conduct, some commenters believed that we should direct FINRA to require the filing and review of private fund advertisements.[159]

Finally, some commenters opposed the imposition of content and/or other restrictions for private funds.[160] They asserted that purchasers of the securities of a private fund that relies on Rule 506(c), must be, at a minimum, accredited investors and thus have met objective criteria demonstrating financial sophistication, which they believed eliminates the risk that other types of investors could be defrauded.[161] A number of commenters pointed out that advertisements of private funds are subject to the antifraud provisions of the federal securities laws and suggested that liability under such provisions provides sufficient investor protections.[162]

We have carefully considered commenters' suggestions and concerns. We are mindful of certain commenters' concerns that private funds engaging in general solicitation may raise certain investor protection issues. We also understand that other commenters believe that additional measures regarding private fund advertising are not necessary because the antifraud provisions of the federal securities laws continue to apply. We will monitor and study the development of private fund advertising and undertake a review to determine whether any further action is necessary.

We remind investment advisers to private funds that they are subject to Rule 206(4)–8 under the Advisers Act.[163] Rule 206(4)–8 provides that it shall constitute a fraudulent, deceptive or manipulative act, practice or course of business within the meaning of Section 206(4) of the Advisers Act for any investment adviser to a pooled investment vehicle [164] to ''(1) [m]ake any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or (2) otherwise engage in any act, practice or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.'' [165]

As was stated by the Commission when it adopted Rule 206–4(8), ''[t]he rule clarifies that an adviser's duty to refrain from fraudulent conduct under the federal securities laws extends to the relationship with ultimate investors and that the Commission may bring enforcement actions under the Advisers Act against investment advisers who defraud investors or prospective investors in those pooled investment vehicles.'' [166] We further stated that we ''intend to employ all of the broad authority that Congress provided us in section 206(4) and direct it at adviser conduct affecting an investor or potential investor in a pooled investment vehicle.'' [167] Recently, for example, we have brought enforcement actions against private fund advisers and others for material misrepresentations to investors and prospective investors regarding fund performance, strategy, and investments, among other things.[168]

We believe that investment advisers that have implemented appropriate policies and procedures regarding, among other things, the nature and content of private fund sales literature, including general solicitation materials, are less likely to use materials that materially mislead investors or otherwise violate the federal securities laws. Accordingly, we believe that investment advisers to private funds should carefully review any such policies and procedures that have been implemented to determine whether they are reasonably designed to prevent the use of fraudulent or materially misleading private fund advertising and make appropriate amendments to those policies and procedures, particularly if the private funds intend to engage in general solicitation activity.[169]

F. Technical and Conforming Amendments

We proposed a number of technical and conforming amendments to Rules 502 and 506 of Regulation D. Under the proposal, we would amend various provisions in Rule 502(b) to clarify that the references to sales to non-accredited investors under Rule 506, and the corresponding informational requirements, would be applicable to offerings under Rule 506(b) and not to offerings under Rule 506(c). We proposed to amend Rule 502(c) to clarify that Rule 502(c)'s prohibition against general solicitation would not apply to offerings under Rule 506(c). In addition, as Section 201(c) of the JOBS Act renumbered Section 4 of the Securities Act, we proposed to amend Regulation D and Rule 144A to update the references to Section 4. Finally, the proposal would update references to Section 2 of the Securities Act in these rules as some of the references have not been updated to reflect the current numbering scheme in Section 2. We received no comments regarding these technical and conforming amendments and are adopting these rule amendments as proposed.

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[158] *See* letters from ICI; IDC.

[159] *See* letters from AFL–CIO and AFR (stating that ''FINRA already pre-reviews broker-dealer advertising; the same requirement should apply to general solicitation and advertising in Rule 506 offerings in light of the significant potential for abuse.''); ICI (noting that ''FINRA has developed an infrastructure to handle such filings and an expertise to substantively review them, and accordingly is best positioned to handle this task.'').

[160] *See, e.g.,* letters from Verrill Dana LLP (stating that ''[t]here is no suggestion in Section 201 that the Commission must distinguish between 'issuers that engage in operational businesses' and 'those that are merely investment vehicles'''); Artivest (noting that for private funds managed by a registered commodity pool operator, the National Futures Association Rule 2–29 contains standards regarding marketing materials).

[161] In general, private funds that pay performance fees to their managers are available only to ''qualified clients'' that have at least $1 million in assets under management or that have a net worth of $2 million (excluding the value of the client's primary residence). *See* Rule 205–3 under the Advisers Act [17 CFR 275.205–3]. *See also* letter from BlackRock.

[162] *See, e.g.,* letters from BlackRock; HFA; MFA (Mar. 22, 2013).

[163] 17 CFR 275.206(4)–8.

[164] Rule 206(4)–8 defines a pooled investment vehicle to mean any investment company as defined in Section 3(a) of the Investment Company Act [15 U.S.C. 80a–3(a)] or any company that would be an investment company under Section 3(a) of that Act but for the exclusion provided from that definition by either Section 3(c)(1) or Section 3(c)(7) of that Act [15 U.S.C. 80a–3(c)(1) or (7)].

[165] *Id.*

[166] *Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles,* Release No. IA–2628 (Aug. 3, 2007) [72 FR 44756 (Aug. 9, 2007)].

[167] *Id.*

[168] *See, e.g., In the Matter of Oppenheimer Asset Management Inc. and Oppenheimer Alternative Investment Management, LLC,* Release No. IA–3566 (Mar. 11, 2013); *In the Matter of Sentinel Investment Management Corp.,* Release No. IA–3530 (Dec. 27, 2012); *In the Matter of Weizhan Tang,* Release No. IA–3482 (Oct. 5, 2012); *In the Matter of Calhoun Asset Management, LLC, et al.,* Release No. IA–3428 (July 9, 2012); *In the Matter of Belal K. Faruki,* Release No. IA–3405 (May 17, 2012); *In the Matter of GMB Capital Management LLC, et al.,* Release No. IA–3399 (Apr. 20, 2012).

[169] We remind investment advisers that are registered or required to be registered under Section 203 of the Advisers Act that they must adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act which include, but are not limited to, violations of Section 206 of the Advisers Act and the rules thereunder. They must also review, no less frequently than annually, the adequacy of the written policies and procedures and the effectiveness of the policies and procedures' implementation. *See* CFR 275.206(4)–7.

III. Final Amendment to Rule 144A

Section 201(a)(2) of the JOBS Act directs the Commission to revise Rule 144A(d)(1) under the Securities Act to provide that securities sold pursuant to Rule 144A may be offered to persons other than QIBs, including by means of general solicitation, provided that securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe is a QIB. To implement the mandated rule change, we proposed amending Rule 144A(d)(1) to eliminate the references to ''offer'' and ''offeree.'' All of the commenters that expressed a view on the proposed amendment to Rule 144A(d)(1) stated that they supported the Commission's proposal.[170] We are adopting the amendment as proposed. As amended, Rule 144A(d)(1) will require only that the securities be sold to a QIB or to a purchaser that the seller and any person acting on behalf of the seller reasonably believe is a QIB.[171] Under this amendment, resales of securities pursuant to Rule 144A can be conducted using general solicitation, so long as the purchasers are limited in this manner.[172]

As a result of the Section 201(a)(2) mandate and the resulting Rule 144A revisions, we are also making technical and conforming revisions to the exceptions in Regulation M relating to transactions in Rule 144A securities, specifically Regulation M Rules 101(b)(10), 102(b)(7) and 104(j)(2). When adopted in 1996, the exceptions delineated in Rules 101(b)(10)(i), 102(b)(7)(i) and 104(j)(2)(i) were generally intended to permit transactions in securities eligible for resale under Rule 144A during a distribution of securities, provided that offers and sales of such securities were made solely to QIBs or persons reasonably believed to be QIBs in certain transactions exempt from registration.[173]

As explained above, Section 201(a)(2) of the JOBS Act directs the Commission to revise Rule 144A to permit offers of securities to persons other than QIBs. As noted above, Rule 144A is being amended to eliminate references to ''offer'' and ''offeree,'' so that the amended rule will require only that securities be sold to a QIB or to a purchaser that the seller and any person acting on behalf of the seller reasonably believes is a QIB.

In order to conform the language in Regulation M to Rule 144A, as amended, we are conforming the Regulation M exceptions by similarly eliminating the references to ''offered'' and ''offerees.'' We believe that these conforming modifications do not result in any substantive change to the Regulation M exceptions and are consistent with the purpose of the exceptions.

As a transition matter, for an ongoing Rule 144A offering that commenced before the effective date of the amendment to Rule 144A(d)(1), offering participants will be entitled to conduct the portion of the offering following the effective date of the amendment to Rule 144A(d)(1) using general solicitation, without affecting the availability of Rule 144A for the portion of the offering that occurred prior to the effective date of the amended rule.

IV. Integration With Offshore Offerings

In the Proposing Release, we noted that the mandate in Section 201(a) that the Commission amend Rule 506 and Rule 144A to permit the use of general solicitation in transactions under those rules has raised questions from some commenters [174] regarding the impact of the use of general solicitation on the availability of the Regulation S safe harbors for concurrent unregistered offerings inside and outside the United States.[175] The safe harbors are important when U.S. and non-U.S. companies engage in global offerings of securities in which the U.S. portion of the offering is conducted in accordance with Rule 144A or Rule 506 and the offshore portion is conducted in reliance on Regulation S.

We expressed our view on this issue in the Proposing Release, which we are reaffirming in this release.[176] Concurrent offshore offerings that are conducted in compliance with Regulation S will not be integrated with domestic unregistered offerings that are conducted in compliance with Rule 506 or Rule 144A, as amended. As explained in the Proposing Release, we believe that our view is consistent with the historical treatment of concurrent Regulation S and Rule 144A/Rule 506 offerings.[177]

V. Paperwork Reduction Act

A. Background

The amendment to Form D contains a ''collection of information'' requirement within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[178] We published a notice requesting comment on the collection of information requirement in the Proposing Release for the rule and form amendments. We submitted that requirement to the Office of Management and Budget (''OMB'') for review and approval in accordance with the PRA and its implementing regulations.[179] The title of this requirement is: ''Form D'' (OMB Control No. 3235–0076).[180]

We adopted Regulation D and Form D as part of the establishment of a series

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[170] *See* letters from IAA; SIFMA and FSR (Oct. 5, 2012); J. Johnson; OTC Markets Group Inc.

[171] Rule 144A(d)(1).

[172] The general solicitation that is permitted in Rule 144A resales from the initial purchaser to the QIBs will not affect the availability of the Section 4(a)(2) exemption or Regulation S for the initial sale of securities by the issuer to the initial purchaser.

[173] *See Anti-Manipulation Rules Concerning Securities Offerings,* Release No. 34–38067 (Dec. 20, 1996) [62 FR 520 (Jan. 3, 1997)] at 530 (''As adopted, the exception permits transactions in Rule 144A Securities during a distribution of such securities, provided that sales of such securities within the United States are made solely to: Qualified institution buyers ('QIBs'), or persons reasonably believed to be QIBs, in transactions exempt from registration under the Securities Act . . . The exception covers both the Rule 144A security being distributed and any reference security.'').

[174] *See, e.g.,* letters from ABA Fed. Reg. Comm. (Apr. 30, 2012); L. Neumann (June 12, 2012); NYCBA (May 4, 2012); SecuritiesLawUSA, PC (June 26, 2012); SIFMA (Apr. 27, 2012).

[175] Regulation S provides a safe harbor for offers and sales of securities outside the United States and includes an issuer and a resale safe harbor. Two general conditions apply to both safe harbors: (1) The securities must be sold in an offshore transaction and (2) there can be no ''directed selling efforts'' in the United States. Rule 902(c)(1) [17 CFR 230.902(c)(1)] broadly defines ''directed selling efforts'' as: Any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities offered in reliance on Regulation S. Such activity includes placing an advertisement in a publication ''with a general circulation in the United States'' that refers to the offering of securities being made in reliance upon Regulation S.

[176] All of the commenters who expressed a view on our interpretation supported it and encouraged us to reiterate it in this release. *See* letters from ABA Fed. Reg. Comm; Forum for U.S. Securities Lawyers in London; IAA; IPA; NYCBA.

[177] *See Offshore Offers and Sales,* Release No. 33–6863 (Apr. 24, 1990) [55 FR 18306 (May 2, 1990)] (stating that ''[o]ffshore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act.''). In addressing the offshore transaction component of the Regulation S safe harbor, the Commission also stated, ''Offers made in the United States in connection with contemporaneous registered offerings or offerings exempt from registration will not preclude reliance on the safe harbors.'' *Id.* at n. 36. Likewise, in addressing directed selling efforts, the Commission stated, ''Offering activities in contemporaneous registered offerings or offerings exempt from registration will not preclude reliance on the safe harbors.'' *Id.* at n. 47. *See also* Rule 500(g) of Regulation D [17 CFR 230.500(g)] (formerly Preliminary Note No. 7 to Regulation D) (''Regulation S may be relied upon for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States.'').

[178] 44 U.S.C. 3501 *et seq.*

[179] 44 U.S.C. 3507(d); 5 CFR 1320.11.

[180] Form D was adopted under the authority of Sections 2(a)(15), 3(b), 4(a)(2), 19(a) and 19(c)(3) of the Securities Act [15 U.S.C. 77b(a)(15), 77c(b), 77d(a)(2), 77s(a) and 77s(c)(3)].

of exemptions for offerings and sales of securities under the Securities Act. The Form D filing is required to be made by issuers as a notice of sales without registration under the Securities Act based on a claim of exemption under Regulation D or Section 4(a)(5) of the Securities Act. The Form D filing is required to include basic information about the issuer, certain related persons, and the offering. This information is needed for implementing the exemptions and analyzing their use. The information collection requirements related to the filing of Form D with the Commission are mandatory to the extent that an issuer elects to make an offering of securities in reliance on the relevant exemption. Responses are not confidential. The hours and costs associated with preparing and filing forms and retaining records constitute reporting and cost burdens imposed by the collection of information requirements. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number.

As discussed above, we proposed to amend Form D to add a check box to indicate an offering relying on the Rule 506(c) exemption. In the Proposing Release, we requested comment on our PRA burden hour and cost estimates and the analysis used to derive such estimates. One commenter responded to our request for comment on the PRA analysis and stated that it believed that the cost estimates in the PRA and economic analysis are too low.[181]

B. Revisions to PRA Reporting and Cost Burden Estimates

Consistent with the PRA analysis in the Proposing Release, we believe that the addition of a check box on Form D to indicate that an issuer is relying on the Rule 506(c) exemption for its offering will have a negligible effect on the paperwork burden of the form. Form D already contains a check box for each basis of exemption claimed under Regulation D; this change simply conforms the form to the new rule amendment. Accordingly, we estimate that under the amendment to Form D, the burden for responding to the collection of information in Form D will be substantially the same as before the amendment to Form D. We believe, however, that the amendment to Rule 506 could increase the number of Form D filings that are made with the Commission because we expect issuers may conduct more Rule 506 offerings.

The table below shows the current total annual compliance burden, in hours and in costs, of the collection of information pursuant to Form D. For purposes of the PRA, we estimate that, over a three-year period, the average burden estimate will be four hours per Form D filing. Our burden estimate represents the average burden for all issuers. This burden is reflected as a one hour burden of preparation on the issuer and a cost of $1,200 per filing. In deriving these estimates, we assume that 25% of the burden of preparation is carried by the issuer internally and that 75% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

TABLE 1—ESTIMATED PAPERWORK BURDEN UNDER FORM D, PRE-AMENDMENT TO RULE 506

	Number of responses (A)[182]	Burden hours/form (B)	Total burden hours (C)=(A)*(B)	Internal issuer time (D)	External professional time (E)	Professional costs (F)=(E)*$400
Form D	18,187	4	72,748	18,187	54,561	$21,824,400

According to our Division of Economic and Risk Analysis (''DERA''), in 2012, 16,067 companies made 18,187 new Form D filings. The annual number of new Form D filings rose from 13,764 in 2009 to 18,187 in 2012, an average increase of approximately 1,474 Form D filings per year, or approximately 10%. Assuming that the macroeconomic factors underlying this increase persist and the number of Form D filings continues to increase by 1,474 filings per year for each of the next three years, the average number of Form D filings in each of the next three years, absent the elimination of the prohibition against general solicitation, would be approximately 21,135.

We anticipate that new paragraph (c) of Rule 506 could result in an even greater annual increase in the number of Form D filings than the 10% annual increase estimated above. As a reference point for the potential increase, we use the impact of another past rule change on the market for Regulation D offerings. In 1997, the Commission amended Rule 144(d) under the Securities Act[183] to reduce the holding period for restricted securities from two years to one year,[184] thereby increasing the attractiveness of Regulation D offerings to investors and to issuers. There were 10,341 Form D filings in 1996. This was followed by a 20% increase in the number of Form D filings in each of the subsequent three calendar years, reaching 17,830 by 1999. Although it is not possible to predict with any degree of accuracy the increase in the number of Rule 506 offerings following the elimination of the prohibition against general solicitation for a new category of Rule 506 offerings, we assume for purposes of this analysis that there could be a similarly significant increase.

For purposes of the PRA and based on our analysis above, we estimate that the amendment to Rule 506 will result in a 20% increase in Form D filings relying on the Rule 506 exemption, or approximately 3,637 filings.[185] We also assume that the number of Form D filings will increase by approximately 3,637 in each year following the adoption of the rule.

[181] *See* letter from NSBA (stating that ''the compliance cost estimates should include the time required by the issuer and their advisors to familiarize themselves with the rule and to comply with the additional verification requirements and the time and costs of investors to comply (for example, with a third-party verification requirement)''). For PRA purposes, we consider only the burden of responding to the collection of information in Form D; we do not consider any of the other costs, direct or indirect, of conducting a Rule 506(c) offering.

[182] We had previously estimated the number of responses to be 25,000, as reflected in OMB's Inventory of Currently Approved Information Collections (available at: *http://www.reginfo.gov/public/do/PRAMain;jsessionid=D37174B5F6F9148DB767D63DF6983A65*), but we are revising this estimate to reflect the number of new Form D filings made in 2012.

[183] 17 CFR 230.144(d).

[184] *See Revision of Holding Period Requirements in Rules 144 and 145,* Release No. 33–7390 (Feb. 20, 1997) [62 FR 9242 (Feb. 28, 1997)].

[185] This number is based on the 18,187 new Form D filings that were made in 2012.

Based on this increase, we estimate that the annual compliance burden of the collection of information requirements for the first year in which issuers will make Form D filings after the adoption of Rule 506(c) will be an aggregate of 21,824 hours of issuer personnel time and $26,188,800 for the services of outside professionals per year.

TABLE 2—ESTIMATED PAPERWORK BURDEN UNDER FORM D, POST-AMENDMENT TO RULE 506

	Number of responses (A) [186]	Burden hours/form (B)	Total burden hours (C)=(A)*(B)	Internal issuer time (D)	External professional time (E)	Professional costs (F)=(E)*$400
Form D	21,824	4	87,296	21,824	65,472	$26,188,800

VI. Economic Analysis

A. Background

We are adopting amendments to Rule 506 and Rule 144A to implement the requirements of Section 201(a) of the JOBS Act.[187] Section 201(a)(1) directs the Commission to revise Rule 506 to provide that the prohibition against general solicitation contained in Rule 502(c) shall not apply to offers and sales of securities made pursuant to Rule 506, as amended, provided that all purchasers of the securities are accredited investors. Section 201(a)(1) also provides that ''such rules shall require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission.'' Section 201(a)(2) of the JOBS Act directs the Commission to revise Rule 144A(d)(1) to provide that securities sold pursuant to Rule 144A may be offered to persons other than QIBs, including by means of general solicitation, provided that securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe are QIBs.

We are mindful of the costs imposed by and the benefits obtained from our rules. The discussion below addresses the economic effects of the amendments to Rule 506, Rule 144A and Form D, including the likely benefits and costs of the amendments as well as the effect of the amendments on efficiency, competition and capital formation.[188] Some of the costs and benefits stem from the statutory mandate of Section 201(a), whereas others are affected by the discretion we have exercised in implementing this mandate. These two types of costs and benefits may not be entirely separable to the extent that our discretion is exercised to realize the benefits that we believe were intended by Section 201(a).

B. Economic Baseline

The baseline analysis that follows is in large part based on information collected from Form D filings submitted by issuers relying on Regulation D to raise capital. As we describe in more detail below, we believe that we do not have a complete view of the Rule 506 market, particularly with respect to the amount of capital raised. Currently, issuers are required to file a Form D within 15 days of the first sale of securities, and are required to report additional sales through amended filings only under certain conditions. In addition, issuers may not report all required information, either due to error or because they do not wish to make the information public. Commenters have suggested and we also have evidence that some issuers do not file a Form D for their offerings in compliance with Rule 503.[189] Consequently, the analysis that follows is necessarily subject to these limitations in the current Form D reporting process.

1. Size of the Exempt Offering Market

Exempt offerings play a significant role in capital formation in the United States. Offerings conducted in reliance on Rule 506 account for 99% of the capital reported as being raised under Regulation D from 2009 to 2012, and represent approximately 94% of the number of Regulation D offerings.[190] The significance of Rule 506 offerings is underscored by the comparison to registered offerings. In 2012, the estimated amount of capital reported as being raised in Rule 506 offerings (including both equity and debt) was $898 billion, compared to $1.2 trillion raised in registered offerings.[191] Of this $898 billion, operating companies (issuers that are not pooled investment funds) reported raising $173 billion, while pooled investment funds reported raising $725 billion.[192] The amount reported as being raised by pooled investment funds is comparable to the amount of capital raised by registered investment funds. In 2012, registered investment funds (which include money market mutual funds, long-term mutual funds, exchange-traded funds, closed-end funds and unit investment trusts) raised approximately $727 billion.[193]

[186] The information in this column is based on the 18,187 new Form D filings that were made in 2012, plus the additional 3,637 filings we estimate would be filed in the first year after the effectiveness of Rule 506(c).

[187] As explained above, the Commission in this release is adopting only those rule and form amendments that are specifically mandated by Section 201(a). Correspondingly, we analyze the economic impacts—including the benefits and costs—only of those rules and form amendments considered within the scope of this release.

[188] Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] requires the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.

[189] Many commenters asserted that non-compliance with Form D filing obligations is widespread. *See, e.g.,* letters from Investor Advisory Committee (stating that ''[i]t is generally acknowledged that a significant number of issuers do not currently file Form D. . .''); AARP (stating that ''[s]imply adding a checkbox to a form that too often goes unfiled and then only after the fact is inadequate to the task at hand.''); AFL–CIO and AFR (stating that ''many issuers today flout the Form D filing requirement for such offerings, further limiting the Commission's ability to provide effective oversight''). *See also* Securities and Exchange Commission, Office of Inspector General, *Regulation D Exemption Process* (Mar. 31, 2009) (''OIG Report''), available at: *http://www.sec-oig.gov/Reports/AuditsInspections/2009/459.pdf* (stating that while the Commission staff ''strongly encourage companies to comply with Rule 503, they are aware of instances in which issuers have failed to comply with Rule 503. . .''). Based on its analysis of the filings required by FINRA Rules 5122 and 5123 during the period of December 3, 2012 to February 5, 2013, DERA estimates that as many as 9% of the offerings represented in the FINRA filings for Regulation D or other private offerings that used a registered broker did not have a corresponding Form D.

[190] *See* Ivanov/Bauguess Study.

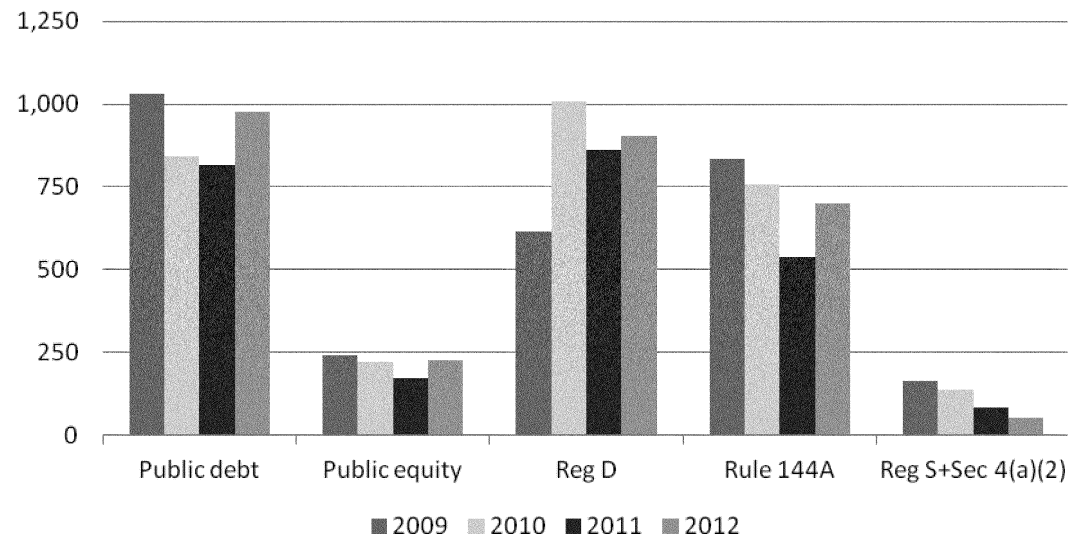
[191] *See id.*

[192] *See id.*

[193] In calculating the amount of capital raised by registered investment funds, we use the net amounts (plus reinvested dividends and reinvested capital gains), which reflect redemptions, and not gross amounts, by open-ended registered investment funds because they face frequent redemptions and do not have redemption restrictions and lock-up periods common among private funds. In addition, we use the new issuances of registered closed-end funds and the new deposits of registered unit investment trusts. *See* 2013 Investment Company Institute Factbook, available at: *http://www.icifactbook.org.*

In 2011, the estimated amount of capital (including both equity and debt) reported as being raised in Rule 506 offerings was $849 billion compared to $985 billion raised in registered offerings.[194] Of the $849 billion, operating companies reported raising $71 billion, while pooled investment funds reported raising $778 billion.[195] More generally, when including offerings pursuant to other exemptions—Rule 144A, Regulation S and Section 4(a)(2)—significantly more capital appears to be raised through exempt offerings than registered offerings (Figure 1).[196]

Figure 1: Capital Raised in U.S. Capital Markets during 2009-2012[197]



At present, issuers are required to file a Form D not later than 15 days after the first sale of securities in a Regulation D offering and an amendment to the Form D only under certain circumstances. Since issuers are not required to submit a Form D filing when an offering is completed, and submit amendments only under certain circumstances, we have no definitive information on the final amounts raised. Figure 2, below, illustrates that at the time of the Form D filing, only 39% of offerings by non-pooled investment fund issuers were completed relative to the total amount sought. Separately, 70% of pooled investment funds state their total offering amount to be ''Indefinite'' in their Form D filings. As a result, the Form D filings of these pooled investment funds likely do not accurately reflect the total amount of securities offered or sold.

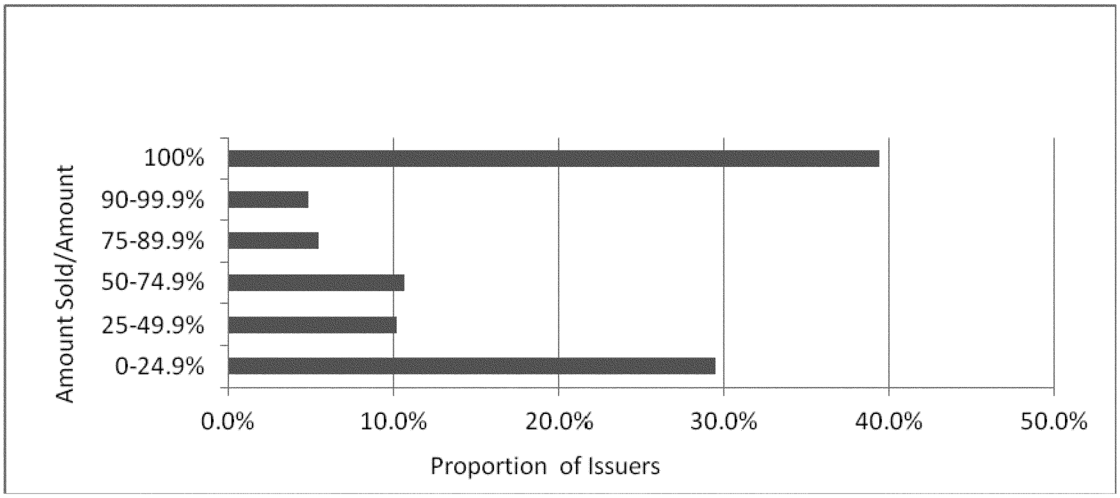
[194] *See* Ivanov/Bauguess Study.

[195] *See id.*

[196] *See id.*

[197] The 2012 non-ABS Rule 144A offerings data is based on an extrapolation of currently available data through May 2012 from Sagient Research System's Placement Tracker database. For more detail, see the Ivanov/Bauguess Study.

Figure 2: Amount Sold as Percentage of Total Offering Amount by Non-Pooled Investment Fund Issuers in Regulation D Offerings at the Time of Form D Filing: 2009-2012



2. Affected Market Participants

The amendments to Rule 506 we are adopting today will affect a number of different market participants. Issuers of securities in Rule 506 offerings include both reporting and non-reporting operating companies and pooled investment funds. Investment advisers organize and sponsor pooled investment funds that conduct Rule 506 offerings. Intermediaries that facilitate Rule 506 offerings include registered broker-dealers, finders and placement agents. Investors in Rule 506 offerings include accredited investors (both natural persons and legal entities) and non-accredited investors who meet certain ''sophistication'' requirements. Each of these market participants is discussed in further detail below.

a. Issuers

Based on the information submitted in 112,467 new and amended Form D filings between 2009 and 2012, there were 67,706 new Regulation D offerings by 49,740 unique issuers during this four-year period.[198] The size of the average Regulation D offering during this period was approximately $30 million, whereas the size of the median offering was approximately $1.5 million.[199] The difference between the average and median offering sizes indicates that the Regulation D market is comprised of many small offerings, which is consistent with the view that many smaller businesses are relying on Regulation D to raise capital, and a smaller number of much larger offerings.

Some information about issuer size is available from Item 5 in Form D, which requires issuers in Regulation D offerings to report their size in terms of revenue ranges or, in the case of certain pooled investment funds, net asset value ranges. All issuers can currently choose not to disclose this size information, however, and a significant majority of issuers that are not pooled investment funds declined to disclose their revenue ranges in the Forms D that they filed between 2009 and 2012. For those that did, most reported a revenue range of less than $1 million (Figure 3).[200] During the 2009–2011 period, approximately 10% of all public companies raised capital in Regulation D offerings; in 2012, approximately 6% of such companies did so.[201] These public companies tended to be smaller and less profitable than their industry peers, which illustrates the significance of the private capital markets to smaller companies, whether public or private.[202]

[198] *See* Ivanov/Bauguess Study.

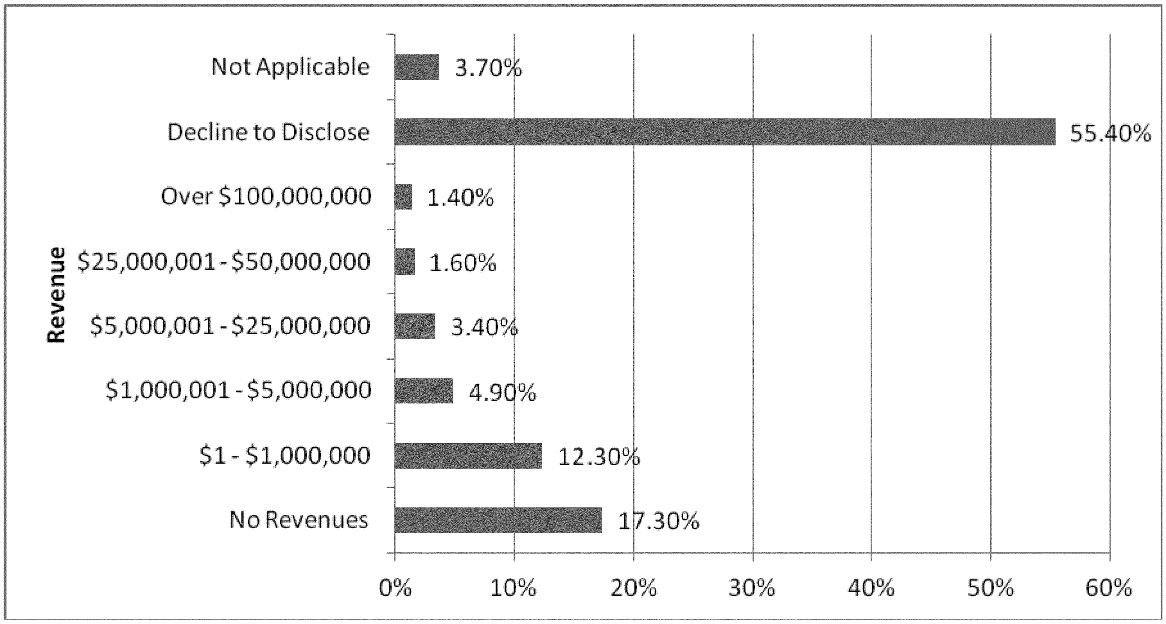
[199] *See id.* A study of unregistered equity offerings by publicly-traded companies over the period 1980–1996 found that the mean offering amount was $12.7 million, whereas the median offering amount was $4.5 million. *See* Michael Hertzel, Michael Lemmon, James Linck and Lynn Rees, *Long-Run Performance Following Private Placements of Equity,* 57 Journal of Finance 2595 (2002).

[200] *See* Ivanov/Bauguess Study.

[201] *Id.* (explaining the methodology of using listings in the Standard & Poor's Compustat database and the University of Chicago's Center for Research in Securities Prices database to determine which companies were public companies).

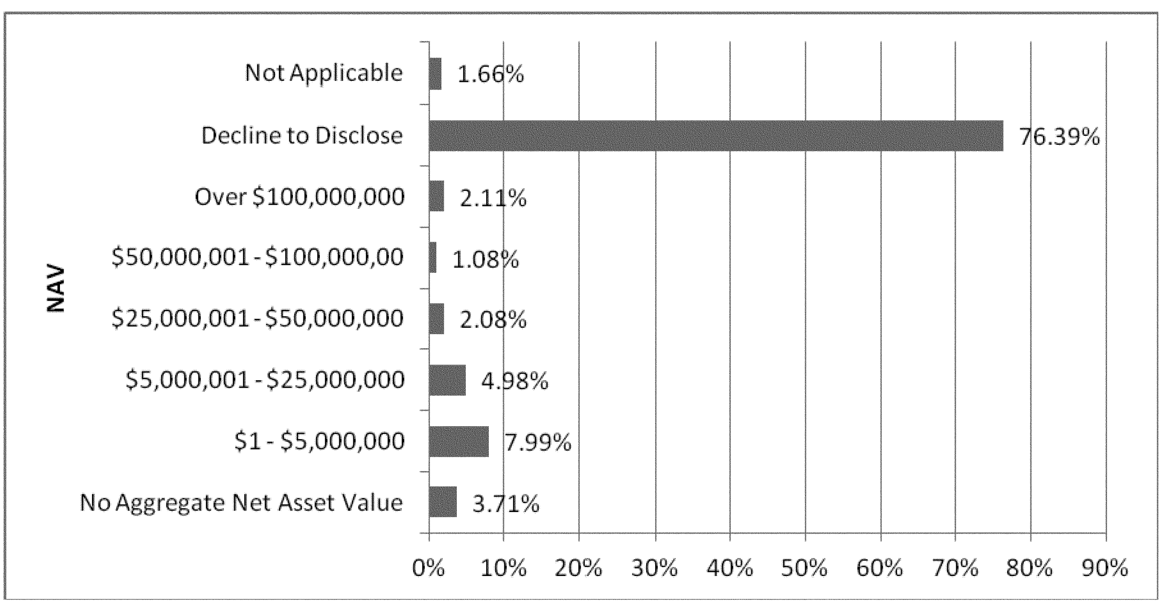
[202] *Id.*

Figure 3: Distribution of Non-Pooled Investment Fund Issuers in Regulation D Market by Revenue: 2009-2012



During this period, pooled investment funds conducted approximately 24% of the total number of Regulation D offerings and raised approximately 81% of the total amount of capital raised in Regulation D offerings.[203] More than 75% of pooled investment funds declined to disclose their net asset value range.

Figure 4: Distribution of Pooled Investment Fund Issuers in Regulation D Market by Net Asset Value: 2009-2012



Between 2009 and 2012, approximately 66% of Regulation D offerings were of equity securities, and almost two-thirds of these were by issuers other than pooled investment funds.[204] Non-U.S. issuers accounted for

[203] *Id.*

[204] *Id.*

approximately 19% of the amount of capital raised in Regulation D offerings, indicating that the U.S. market is a significant source of capital for these issuers.[205]

Unlike in Regulation D offerings, issuers conducting Rule 144A offerings are not required to disclose information about their offerings to the Commission, which limits our ability to measure the size of the Rule 144A market. Based on transaction information collected by third-party data providers,[206] we can broadly characterize the Rule 144A market as being divided between ABS and non-ABS offerings. These sources indicate that, over the four-year period from 2009 to 2012, there were 3,510 non-ABS Rule 144A offerings by 1,965 unique issuers. During this period, the average non-ABS offering size was approximately $526 million, while the median non-ABS offering size was $350 million. These offering sizes are significantly larger than the average and median amounts of Regulation D offerings, as discussed above, indicating that the Rule 144A market, as compared to the Regulation D market, is characterized by much larger issues (which we presume correlate to larger issuers, as well) and, based on the number of Rule 144A offerings, far fewer issuers. Another significant difference from Regulation D offerings is the type of security offered. During this period, over 99% of the non-ABS offerings in the Rule 144A market were debt offerings,[207] compared to 13% of Regulation D offerings.[208]

b. Investors

We have relatively little information on the types and number of investors in Rule 506 offerings. Form D currently requires issuers in Rule 506 offerings to provide information about the total number of investors who have already invested in the offering and the number of persons who do not qualify as accredited investors.[209] In 2012, approximately 153,000 investors participated in offerings by operating companies, while approximately 81,000 investors invested in offerings by pooled investment funds.[210] Because some investors participate in multiple offerings, these numbers likely overestimate the actual number of unique investors in these reported offerings. In offerings under Rule 506(b), both accredited investors and up to 35 non-accredited investors who meet certain sophistication requirements are eligible to purchase securities. In offerings under new Rule 506(c), only accredited investors will be eligible to purchase securities.

Information collected from Form D filings indicates that most Rule 506 offerings do not involve broad investor participation. More than two-thirds of these offerings have ten or fewer investors, while less than 5% of these offerings have more than 30 investors. Although Rule 506 currently allows for the participation of non-accredited investors who meet certain sophistication requirements, such non-accredited investors reportedly purchased securities in only 11% of the Rule 506 offerings conducted between 2009 and 2012.[211] Only 8% of the offerings by pooled investment funds included non-accredited investors, compared to 12% of the offerings by other issuers.[212]

[205] *Id.*

[206] These statistics are based on a review of data from Securities Data Corporation's New Issues database (Thomson Financial) and Sagient Research System's Placement Tracker database.

[207] This statistic is based on a review of data from Securities Data Corporation's New Issues database (Thomson Financial) and Sagient Research System's Placement Tracker database.

[208] *See* Ivanov/Bauguess Study.

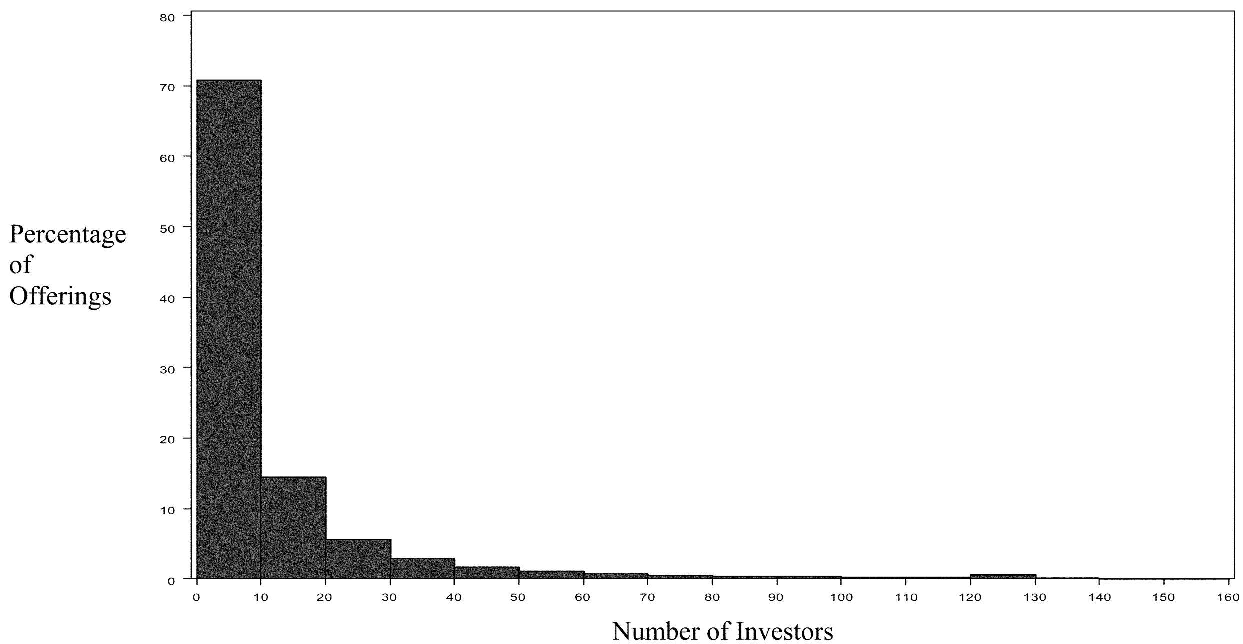
[209] *See* Item 14 of Form D. Form D does not require any other information on the types of investors, such as whether they are natural persons or legal entities.

[210] These numbers are based on initial Form D filings submitted in 2012.

[211] *See* Ivanov/Bauguess Study.

[212] *Id.*

Figure 5: Distribution of Regulation D Offerings by Number of Investors: 2009-2012



As stated above, between 2009 and 2012, the size of the median Regulation D offering, based on the information in Form D filings, was approximately $1.5 million. The presence of so many relatively small offerings suggests that a sizable number of current investors in Rule 506 offerings are natural persons or legal entities in which all equity owners are natural persons. This is because smaller offerings may not provide sufficient scale for institutional investors to earn a sizable return. Institutional investors typically have a larger investible capital base and more formal screening procedures compared to investors who are natural persons, and the associated costs of identifying potential investments and monitoring their investment portfolio lead them to make larger investments than natural persons.[213] As for whether natural persons investing in these offerings are accredited investors or non-accredited investors, almost 90% of the Regulation D offerings conducted between 2009 and 2012 did not involve any non-accredited investors.[214]

While we do not know what percentage of investors in Rule 506 offerings are natural persons, the vast majority of Regulation D offerings are conducted without the use of an intermediary,[215] suggesting that many of the investors in Regulation D offerings likely have a pre-existing relationship with the issuer or its management because these offerings would not have been conducted using general solicitation. This category of investors is likely to be much smaller than the total number of eligible investors for Rule 506(c) offerings, which is potentially very large. We estimate that at least 8.7 million U.S. households, or 7.4% of all U.S. households, qualified as accredited investors in 2010, based on the net worth standard in the definition of ''accredited investor'' (Figure 6).[216]

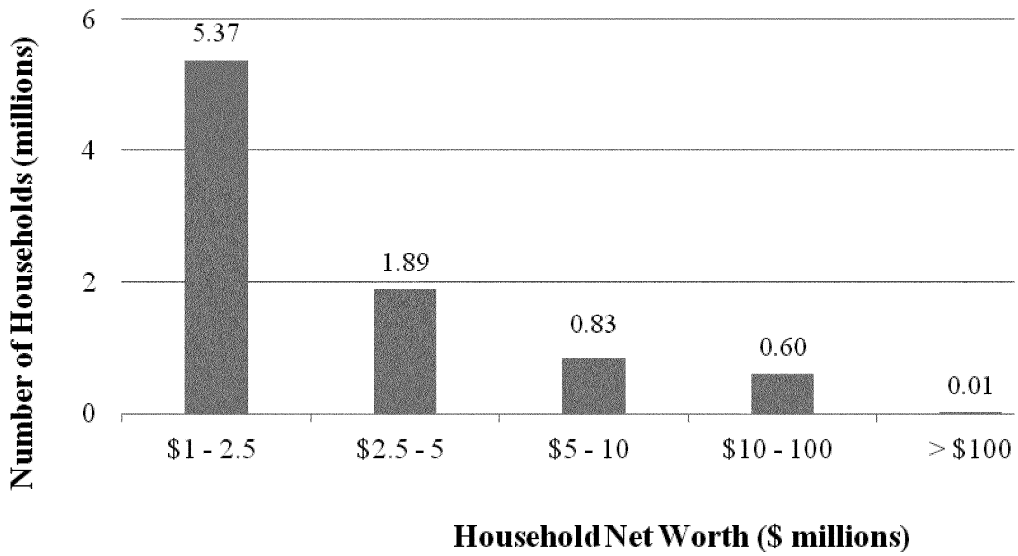
[213] *See, e.g.,* George Fenn, Nellie Liang and Stephen Prowes, The Economics of Private Equity Markets (1998); Steven Kaplan and Per Strömberg, *Leveraged Buyouts and Private Equity,* 23 Journal of Economic Perspectives 121 (2009).

[214] *See* Ivanov/Bauguess Study.

[215] An analysis of all Form D filings submitted between 2009 to 2012 shows that approximately 11% of all new offerings reported sales commissions of greater than zero because the issuers used intermediaries. *See* Ivanov/Bauguess Study. We assume that the lack of a commission indicates the absence of an intermediary.

[216] This estimate is based on net worth and household data from the Federal Reserve Board's Triennial Survey of Consumer Finances 2010. Our calculations are based on all 32,410 observations in the 2010 survey.

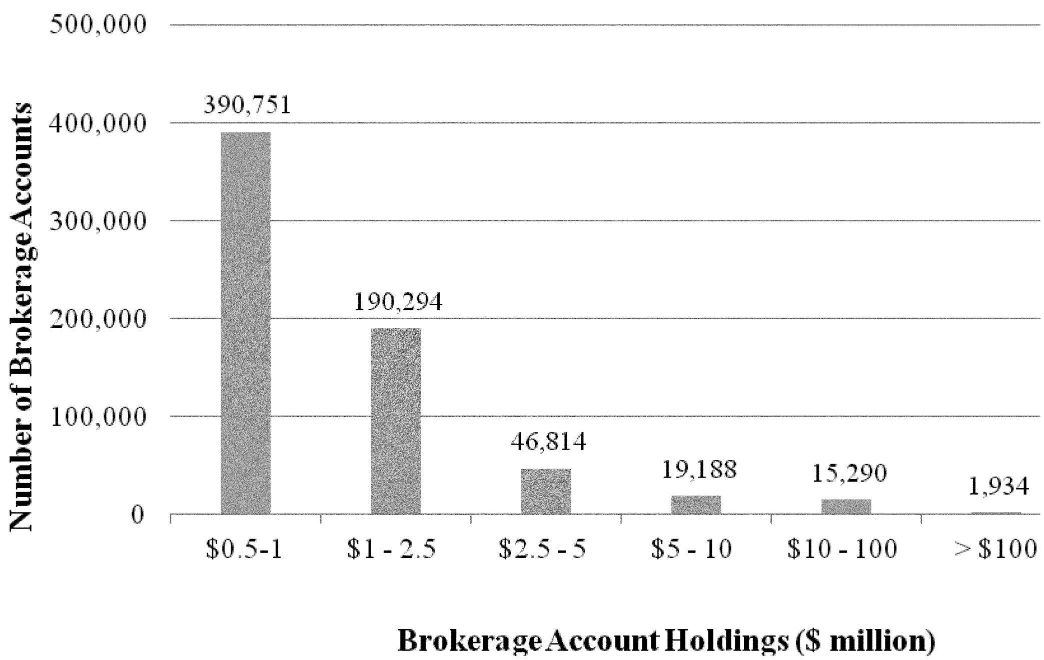
Figure 6: Number of U.S. Households that Qualify as Accredited Investors Based on 2010 Net Worth



Our analysis, however, leads us to believe that only a small percentage of these households are likely to participate in securities offerings, especially exempt offerings. First, as mentioned above, data from Form D filings in 2012 suggests that fewer than 234,000 investors (of which an unknown subset are natural persons) participated in Regulation D offerings, which is small compared to the 8.7 million households that qualify as accredited investors. Second, evidence suggests that only a small fraction of the total accredited investor population has significant levels of direct stockholdings. Based on an analysis of retail stock holding data for 33 million brokerage accounts in 2010, only 3.7 million accounts had at least $100,000 of direct investments in equity securities issued by public companies listed on domestic national securities exchanges, while only 664,000 accounts had at least $500,000 of direct investments in such equity securities (Figure 7).[217] Assuming that investments in publicly-traded equity securities are a gateway to investments in securities issued in exempt offerings, and accredited investors with investment experience in publicly-traded equity securities are more likely to participate in an exempt offering than accredited investors who do not, the set of accredited investors likely to be interested in investing in Rule 506(c) offerings could be significantly smaller than the total accredited investor population.

[217] This analysis by DERA is based on the stock holdings of retail investors from more than 100 brokerage firms covering more than 33 million accounts during the period June 2010–May 2011.

Figure 7: Direct Stock Holdings of Retail Investors, 2010



Investors in Rule 144A offerings are QIBs, which comprise a broad range of U.S. entities, including mutual funds, pension funds, banks, savings and loan associations, investment companies, insurance companies and entities whose equity owners are all QIBs.[218] As there is no obligation for issuers in Rule 144A offerings to publicly disclose the characteristics of their investors, the information available on the number and types of QIBs in the Rule 144A market is not broadly known, and is generally available only to those financial intermediaries who act as initial purchasers in the offerings.

c. Investment Advisers

As of December 2012, there were 10,870 Commission-registered investment advisers that filed Form ADV with the Commission, representing approximately $50 trillion total assets under management.[219] The average investment adviser registered with the Commission has assets under management of approximately $4.6 billion; the median size of assets under management for these registered investment advisers is $258 million.

Approximately one-fourth of registered investment advisers (2,842) currently advise (or advised) private funds that filed Form D between 2002 and 2012, while another 1,250 registered investment advisers currently advise (or advised) private funds that did not file Form D during the same period. The registered investment advisers advising private funds that submitted Form D filings during this period had average assets under management of $8.7 billion, while the ones advising private funds that did not submit Form D filings had average assets under management of $8.6 billion. Registered investment advisers that did not advise private funds (6,623) are considerably smaller, with average assets under management of $2.1 billion.

d. Broker-Dealers

As of December 2012, there were 4,450 broker-dealers registered with the Commission who file on Form X–17A–5, with average total assets of approximately $1.1 billion per broker-dealer. The aggregate total assets of these registered broker-dealers are approximately $4.9 trillion. Of these registered broker-dealers, 410 are dually registered as investment advisers. The dually registered broker-dealers are larger (average total assets of $6.4 billion) than those that are not dually registered. Among the dually registered broker-dealers, we identified 24 that currently have or have had private funds that submitted Form D filings between 2002 and 2012.

3. Current Practices

The extent of the economic impact of the amendments to Rule 506 will depend on the current practices of issuers and market participants in Rule 506 offerings. As issuers in the Regulation D market are not required to disclose in Form D how they formed a reasonable belief that the purchasers in their Rule 506 offerings are accredited investors or sophisticated investors and are not currently required to take reasonable steps to verify the accredited investor status of these purchasers, the Commission does not have any data on current verification practices used in such offerings, if any. Commenters, however, provided examples of current practices of how issuers collect information from a potential purchaser to form a reasonable belief that he or she is an accredited investor. One commenter suggested that a large number of issuers rely on lists of accredited investors created and maintained by a reliable third party, such as registered broker-dealers,[220] which would be consistent with the

[218] Non-U.S. investors generally do not participate in Rule 144A offerings; rather, they participate in Regulation S offerings. Issuers will frequently conduct side-by-side Rule 144A and Regulation S offerings.

[219] For the same time period, 2,303 exempt reporting advisers filed a Form ADV with the Commission. Certain investment advisers that are ineligible to register with the Commission may also be exempt from registration with any state.

[220] *See* letter from J. McLaughlin.

Commission's view that an issuer would not contravene Rule 502(c)'s prohibition against general solicitation if the issuer or its agent has a pre-existing substantive relationship with the offerees.[221] Other commenters asserted that many issuers rely on the services of placement agents to obtain information about accredited investor status and to complete a Rule 506 transaction.[222] One commenter stated that the most common practice was a combination of an investor suitability questionnaire and investor self-certification.[223] These commenters, however, did not provide data to allow for an estimate of the frequency of usage and the costs associated with these practices.

C. Analysis of the Amendment to Rule 506

Congress has mandated that we eliminate the prohibition against general solicitation for a subset of Rule 506 offerings.[224] Below, we analyze the benefits and costs associated with the amendments to Rule 506 in light of the baseline discussed above. Because existing Rule 506 has always been subject to the prohibition against general solicitation, there are significant data and informational limitations on our ability to quantify the economic impact of eliminating that prohibition in certain Rule 506 offerings. As discussed above, we do not believe that the Form D filings available on the Commission's Electronic Data Gathering, Analysis and Retrieval (''EDGAR'') system present a complete view of the Rule 506 market, as there are some Rule 506 offerings for which a Form D is not filed and the information presented in the Forms D that are filed is not necessarily comprehensive.[225] In addition, as discussed below, we believe that there are sufficient differences between Rule 504, as amended to permit general solicitation from 1992 to 1999, and Rule 506(c) such that it would not be useful to look to the Rule 504 market during that period to make meaningful predictions as to the type or magnitude of the effects of eliminating the prohibition against general solicitation for Rule 506(c) offerings. For example, the amount of capital that could be raised under Rule 504, as amended during this period, was capped at $1 million over a 12-month period; the securities in a Rule 504 offering could be sold to an unlimited number of non-accredited investors; and the securities sold in Rule 504 offerings were not restricted securities for purposes of resale. We provide below a qualitative analysis of the potential costs and benefits of eliminating the prohibition against general solicitation in certain Rule 506 offerings, supplementing that analysis with quantification, where possible, based on existing data.

1. Benefits to Issuers

The elimination of the prohibition against general solicitation for a subset of Rule 506 offerings will enable issuers to solicit potential investors directly, through both physical (such as mailings, newspaper advertisements and billboards) and electronic (such as the Internet, social media, email and television) means. As a result, we anticipate that issuers will be able to reach a much greater number of potential investors than is currently the case, thereby increasing their access to sources of capital. We note that many commenters, including those representing small businesses, biotechnology companies and angel investors, stated that the elimination of the prohibition against general solicitation will facilitate capital formation by allowing businesses, particularly early-stage companies, to solicit investments from a larger pool of investors.[226] This could increase overall capital formation if issuers that previously did not raise capital from individual investors because it was too costly to solicit them through intermediaries now choose to solicit investors directly using general solicitation in accordance with Rule 506(c). Alternatively, if issuers use new Rule 506(c) in lieu of other methods of raising capital, such as registered offerings or unregistered non-Rule 506(c) offerings, then Rule 506(c) would replace one source of capital for another, thereby potentially improving the efficiency of capital flow through lower issuance costs, but not necessarily increasing the gross amount raised.

We believe that it is reasonable to conclude that allowing issuers to have wider access to accredited investors by eliminating the prohibition against general solicitation for a category of Rule 506 offerings will significantly improve their access to capital and potentially enhance capital formation and lower the issuance cost. Although the lack of available data on the economic impact of eliminating the prohibition against general solicitation in Rule 506 offerings precludes us from quantifying the magnitude of this effect, the Commission has some evidence of the effect of the availability of general solicitation on issuers' ability to raise capital based on information about the number of Rule 504 offerings from 1992 to 2001, which covers the period during which the prohibition against general solicitation was lifted for Rule 504,[227] and subsequently reinstated in 1999.[228] In particular, and as shown in the chart below, the number of Rule 504 offerings increased at an average annual rate of 10.6% from 1992 through 1999.[229] In 2000, following the reinstatement of the ban, the number of Rule 504 offerings declined by almost 44%. This decline is coincident with the general market decline in 2000, including the collapse of the Internet bubble, which may have been the cause or at least a significant contributing factor to the rate of decline. During 2000, however, there was not a concurrent decline in either the number of Rule 505 offerings or the number of Rule 506 offerings. To the contrary, the number of Rule 506 offerings increased by about 54% in 2000, while the number of Rule 505 offerings remained largely unchanged (Figure 8). Declines in the numbers of Rule 505 and Rule 506 offerings followed in 2001, when presumably both types of offerings were

[221] *See* Release No. 33–7856.

[222] *See* letters from SIFMA and FSR (Oct. 5, 2012); IAA.

[223] *See* letters from NSBA; MFA (May 4, 2012) (noting that, in the hedge fund industry, a potential hedge fund investor must complete ''a subscription document provided by the fund's manager that provides a detailed description of, among other things, the qualification standards that a purchaser must meet under the federal securities laws'').

[224] The legislative history of a bill that was introduced (but not adopted) at or around the time of the JOBS Act may be instructive with respect to how Congress viewed the effect of eliminating the prohibition against general solicitation in private offerings. In its report on a bill that would have amended Section 4(a)(2) of the Securities Act to permit the use of general solicitation, the House Committee on Financial Services stated that ''regulations such as the prohibition of general solicitation and advertising in Regulation D Rule 506 offerings inhibit capital formation.'' Access to Capital for Job Creators Act, H.R. Rep. 112–263, at 2 (2011). Accordingly, ''[t]he legislation would allow companies greater access to accredited investors and to new sources of capital to grow and create jobs, without putting less sophisticated investors at risk.'' *Id.*

[225] Because filing a Form D is not a condition for relying on Regulation D, commenters have noted that many issuers do not file a Form D when raising capital under Rule 506. Issuers are currently required to file an initial Form D within 15 days of the first sale of securities, but are required to report additional sales through amended filings only under certain conditions, which means that in many cases, the total amount of capital raised in a Regulation D offering is not reported on Form D. Finally, issuers do not report all required information, either due to error or because they do not wish to make the information public. For example, issuers have the option in Form D to decline to disclose their revenues or net asset values.

[226] *See, e.g.,* letters from BIO; NSBA.

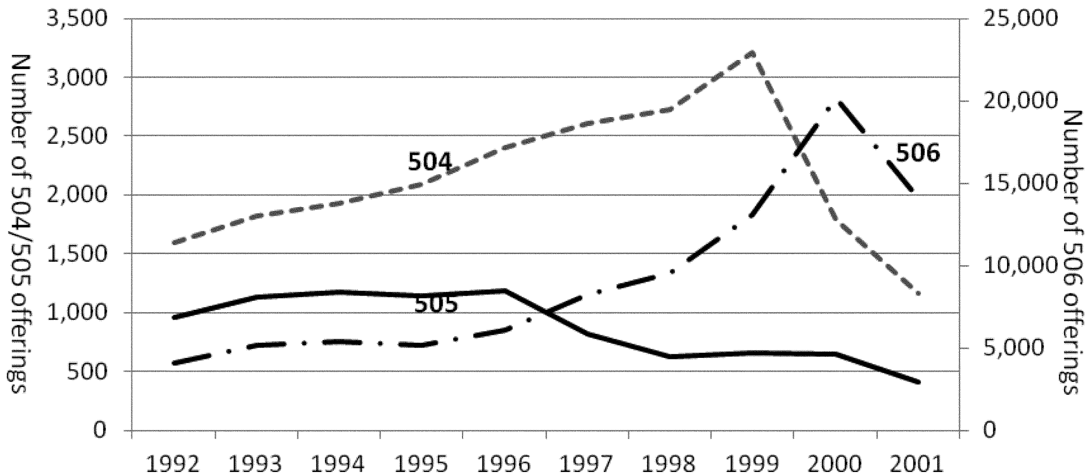
[227] *See Small Business Initiatives,* Release No. 33–6949 (July 30, 1992) [57 FR 36442 (Aug. 13, 1992)].

[228] *See* Release No. 33–7644.

[229] This is based on an analysis of Form REGDEX filings on EDGAR.

negatively affected by the general market decline, although Rule 504 offerings experienced a sharper decline (−35%) compared to Rule 506 offerings (−30%). While it is not possible to disentangle the broader market effects in 2000 from the reinstatement of the prohibition against general solicitation on the number of Rule 504 offerings, the steady increase in the number of Rule 504 offerings during the seven-year period following the elimination, in 1992, of the prohibition against general solicitation and the subsequent sharp decline in the number of Rule 504 offerings is consistent with the view that issuers' ability to generally solicit may enhance their ability to raise capital.

Figure 8: Number of New Regulation D Offerings: 1992-2001



The development of the venture capital (VC) industry in the United States may also be a relevant example to illustrate the potential for enhanced capital formation that may result from allowing issuers to have access to a wider range of investors. Under the Employment Retirement Income Security Act of 1974, pension fund managers are subject to a ''prudent man'' standard of care in making investments.[230] Prior to 1979, there was uncertainty under the U.S. Department of Labor's then-existing interpretations of this standard as to whether pension funds could invest in venture capital and start-up companies. In 1979, the Department clarified its interpretation of this standard by indicating that portfolio diversification is a factor in determining whether an investment is prudent, which indicated that pension funds would not be precluded from making investments in VC funds.[231] Following this regulatory change, the VC industry experienced substantial growth: VC commitments increased from $218 million in 1978 (of which pension funds supplied approximately 15%) to $3 billion in 1988 (of which pension funds supplied approximately 46%).[232]

We also anticipate that allowing issuers to solicit potential investors directly will lower the direct costs of Rule 506 offerings. Although none of the commenters provided data on direct cost savings, and although Form D filings do not present a complete view of the market, we do have estimates of the direct offering costs paid by issuers that use an intermediary to locate investors in Rule 506 offerings. An analysis of all Form D filings submitted between 2009 to 2012 shows that approximately 11% of all new Regulation D offerings reported sales commissions of greater than zero because the issuers used intermediaries.[233] The average commission paid to these intermediaries was 5.9% of the offering size, with the median commission being approximately 5%. Accordingly, for a $5 million offering, which was the median size of a Regulation D offering with a commission during this period, an issuer could potentially save up to $250,000 if it solicits investors directly rather than through an intermediary, minus the cost of its own solicitation efforts and the cost associated with verifying accredited investor status.[234] This potential benefit would likely be larger on a percentage basis for smaller offerings. During this four-year period, of the issuers that paid a commission in connection with a Regulation D offering, issuers raising up to $1 million in capital paid on average a 6.5% commission, whereas issuers raising over $50 million in capital paid on average a 1.9% commission.[235]

Even for issuers that do not currently use an intermediary, allowing issuers to generally solicit would likely lower the search costs associated with finding accredited investors who would be interested in a particular offering, thus enhancing economic efficiency.[236] If lower search costs expand the pool of interested investors for offerings, there could be greater competition among

[230] 29 U.S.C. 1104(a).

[231] *See* 29 CFR 2550.404a–1(b)(1)(i).

[232] *See* Paul A. Gompers and Josh Lerner, The Venture Capital Cycle (2006); Paul Gompers, *The Rise and Fall of Venture Capital,* 23 Business and Economic History 1 (1994).

[233] *See* Ivanov/Bauguess Study.

[234] We recognize that intermediaries can provide benefits to issuers in addition to locating investors. For example, an intermediary may be able to help an issuer obtain better pricing and terms or provide access to investors that can provide strategic or other advice to the issuer. An intermediary could also provide accreditation services. Unfortunately, we do not have data to quantify these benefits.

[235] *See* Ivanov/Bauguess Study.

[236] See, for example, Erik Sirri and Peter Tufano, *Costly Search and Mutual Fund Flows,* 53 Journal of Finance 1589 (1998), for a similar argument with respect to investors in mutual funds.

investors, thereby lowering the costs of capital for issuers.[237]

The elimination of the prohibition against general solicitation would also reduce the uncertainty for issuers as to whether a Rule 506 offering can be completed in certain situations, and would eliminate the costs of complying with the prohibition.[238] Under existing Rule 506, an inadvertent release of information about an offering to entities or persons with whom the issuer does not have a pre-existing substantive relationship has been viewed by some as raising questions about the issuer's ability to rely on the exemption for the entire offering.[239] In addition, some private funds have been reluctant to respond to press inquiries or to correct inaccurate reports due to concerns about these discussions being misconstrued as a general solicitation.[240] Under Rule 506(c), any such uncertainty as to the availability of the exemption due to the public disclosure of information will be reduced. Nevertheless, there is no data available to quantify or estimate these effects.

2. Benefits to Investors

The elimination of the prohibition against general solicitation in Rule 506(c) offerings will likely increase the amount and types of information about issuers and offerings that are communicated to investors, which could also lead to more efficient pricing for the offered securities. In addition, accredited investors who previously have found it difficult to find investment opportunities in Rule 506 offerings may be able to find and potentially invest in a larger and more diverse pool of potential investment opportunities, which would result in a more efficient allocation of investments by accredited investors.[241] Thus, Rule 506(c) could increase capital formation and at the same time improve its allocative efficiency.[242] One commenter argued that we do not provide data to support the statements that accredited investors need new opportunities or cannot find new opportunities under the current rules prohibiting the use of general solicitation in Rule 506 offerings.[243] While we do not have data to test the validity of these statements since general solicitation has heretofore been prohibited in Rule 506 offerings, economic theory suggests that expanding investors' opportunities for investment generally results in more efficient allocation of capital. For example, one seminal study suggests that if some investors have incomplete information and are not aware of all firms in the economy, risk sharing is incomplete and inefficient.[244] Information that makes investors aware of the existence of these firms and enlarges the investor base leads to improved risk sharing and lower cost of capital.

With respect to private funds in particular, in the Proposing Release, we noted that eliminating the prohibition against general solicitation would allow accredited investors to gather information about private funds at relatively lower costs and to allocate their capital more efficiently.[245] Increased information about private fund strategies, management fees and performance information would likely lead to greater competition among private funds for investor capital.

Some commenters noted that greater transparency about private funds' activities would benefit investors in these funds, and communications about these activities would be subject to the antifraud provisions of the federal securities laws and FINRA regulations on the preparation of marketing materials.[246] Other commenters believed that private funds engaging in general solicitation should be subject to form, content and/or other restrictions, such as performance and advertising standards that are analogous to the standards that are applicable to mutual funds in order to engage in general solicitation.[247] One of the commenters suggested that the Commission develop a rule tailored to the ways private funds calculate and present performance, rather than extending mutual fund performance rules to private funds.[248] With respect to private funds sold through broker-dealers subject to FINRA's rules of conduct, some commenters believed that we should direct FINRA to require the filing and review of private fund advertisements.[249]

While the lack of data does not allow us to quantify the costs and benefits of eliminating the prohibition against general solicitation under Rule 506(c) for private funds, we believe that the potential for an increase in fraudulent or deceptive issuer behavior due to the elimination of the prohibition may be limited to some extent by the competitive nature of the private funds industry as well as by the fact that there are often repeat interactions between private funds and their investors.[250]

3. Costs

Eliminating the prohibition against general solicitation could result in heightened fraudulent activity in Rule 506(c) offerings because it will be easier for promoters of fraudulent schemes to reach potential investors through general solicitation. An increase in fraud would not only harm those investors who are defrauded, it would undermine investor participation in Rule 506(c) offerings and could negatively affect capital-raising by legitimate issuers—for example, by reducing investor participation in Rule 506(c) offerings—thereby inhibiting capital formation and reducing efficiency. One commenter was concerned that investors may confuse private funds with registered investment companies.[251] In such cases, fraud that occurs with private funds may cause

[237] For example, a study on offerings involving venture capitalists finds that increased competition among them results in higher valuations for issuers. *See* Paul Gompers and Josh Lerner, *Money Chasing Deals? The Impact of Fund Inflows on Private Equity Valuations,* 55 Journal of Financial Economics 281 (2000).

[238] *See* letter from MFA (May 4, 2012).

[239] *See, e.g.,* letter from S. Lorne and J. McLaughlin (Aug. 5, 2008) on Release No. 33–8828 (stating that ''[o]n occasion, the prohibition forces issuers to delay or even cancel offerings because of communications—sometimes inadvertent—that could be viewed in hindsight as a solicitation. The need to police communications by transaction participants, and to analyze and remedy inadvertent communications, also adds significantly to the cost of effecting private placements.'').

[240] *See, e.g.,* letters from D.E. Shaw & Co. (Apr. 3, 2006) on *Exposure Draft of Final Report of Advisory Committee on Smaller Public Companies,* Release No. 33–8666 (Feb. 28, 2006); MFA (May 4, 2012).

[241] This benefit may not be applicable with respect to every issuer (*e.g.,* certain private funds that offer their shares continuously at net asset value).

[242] Allocative efficiency is a condition that is reached when resources are allocated in a way that allows the maximum possible net benefit from their use. In this context, it means the right number of dollars from the right types of investors going to the most suitable investments on efficient terms.

[243] *See* letter from Consumer Federation.

[244] *See* Robert Merton, *A Simple Model of Capital Market Equilibrium With Incomplete Information,* 42 Journal of Finance 483 (1987).

[245] *See, e.g.,* letter from MFA (May 4, 2012); and Managed Funds Association, Petition for Rulemaking on Rule 502 of Regulation D under the Securities Act of 1933, File No. 4–643 (Jan. 9, 2012) (''MFA Petition'').

[246] *See* letters from IAA; BlackRock; MFA (Sept. 28, 2012).

[247] *See, e.g.,* letters from AFL–CIO and AFR; Sen. Levin; Consumer Federation; Fund Democracy; Investor Advisory Committee; ICI; IDC; Rep. Waters; NASAA; P. Turney; and Sens. Reed, Levin, Durbin, Harkin, Lautenberg, Franken and Akaka.

[248] *See* letter from ICI.

[249] Letters from AFL–CIO and AFR; ICI.

[250] *See, e.g.,* William Fung and David Hsieh, *Hedge Fund Benchmarks: Information Content and Biases,* 58 Financial Analysts Journal 22 (2002); Rajarishi Nahata, *Venture Capital Reputation and Investment Performance,* 90 Journal of Financial Economics 127 (2008); Douglas Cumming and Uwe Walz, *Private Equity Returns and Disclosure Around the World,* 41 Journal of International Business Studies 727 (2010).

[251] *See* letters from ICI; ICI re: MFA Petition (Feb. 7, 2012).

investors to associate the wrongdoing with registered investment companies, and therefore refrain from investing in registered investment companies. In addition, some issuers with publicly-traded securities may use general solicitation for a purported Rule 506(c) offering to generate investor interest in the secondary trading markets, especially in the over-the-counter markets, which could be used by insiders to resell securities at inflated prices. This would impose costs to investors in these secondary markets, as well as investors in Rule 506(c) offerings, and could erode investor participation in Rule 506(c) offerings, thus potentially raising the cost of capital for issuers in this market. As discussed above, we cannot quantify these potential costs because the existence of the prohibition against general solicitation in Rule 506 offerings until now means that data on the economic impact of eliminating the prohibition is not available.

Several commenters echoed concerns regarding the potential of fraud related to private funds in the Rule 506(c) market.[252] Empirical evidence on the extent of fraud involving private funds is not readily available. While a few economic studies suggest that certain hedge funds engage in various types of misreporting, such as misrepresenting past performance,[253] delaying disclosure of returns [254] and inflating returns at the end of the fiscal year in order to earn higher fees,[255] these studies do not provide information about the extent or magnitude of any such misreporting activities. In a 2003 report, the Commission staff noted that there was no evidence that hedge funds were disproportionately involved in fraudulent activity and that the charges brought by the Commission in 38 enforcement actions against hedge fund advisers and hedge funds between 1999 and 2003 were similar to the charges against other types of investment advisers.[256] Evidence on the extent of fraud involving other types of pooled investment funds also is sparse. A more recent study has identified 245 lawsuits (both federal and state) involving 200 venture capitalists as defendants between 1975 and 2007, and has shown that VC funds that are older and have a larger presence in terms of size and network are less likely to be sued.[257]

A number of commenters [258] noted the Commission's experience with the elimination of the prohibition against general solicitation for Rule 504 offerings in 1992,[259] and its subsequent reinstatement in 1999 as a result of heightened fraudulent activity.[260] We do not believe that our experience with offerings conducted pursuant to Rule 504, as amended in 1992, is particularly instructive with respect to the potential incidence of fraud resulting from our implementation of Section 201(a) of the JOBS Act, for a number of reasons. In 1992, when we amended Rule 504 to eliminate the prohibition against general solicitation, we also provided that the securities issued in these Rule 504 offerings would not be ''restricted securities'' for purposes of resale pursuant to Rule 144 under the Securities Act.[261] As a result, a non-reporting company could sell up to $1 million of immediately freely-tradable securities in a 12-month period and be subject only to the antifraud and civil liability provisions of the federal securities laws.

By 1998, we concluded that securities issued in these Rule 504 offerings facilitated a number of fraudulent secondary transactions in the over-the-counter markets, and that these securities were issued by ''microcap'' companies, characterized by thin capitalization, low share prices and little or no analyst coverage.[262] At that time, we stated that, while ''we believe that the scope of abuse is small in relation to the actual usage of the exemption, we also believe that a regulatory response may be necessary.'' [263] As the freely-tradable nature of the securities facilitated the fraudulent secondary transactions, we proposed to ''implement the same resale restrictions on securities issued in a Rule 504 transaction as apply to transactions under the other Regulation D exemptions,'' in addition to reinstating the prohibition against general solicitation. Although we recognized that resale restrictions would have ''some impact upon small businesses trying to raise 'seed capital' in bona fide transactions,'' we believed that such restrictions were necessary so that ''unscrupulous stock promoters will be less likely to use Rule 504 as the source of the freely tradable securities they need to facilitate their fraudulent activities in the secondary markets.'' [264]

In contrast, issuers using Rule 506(c) can sell only to accredited investors, and the securities issued in these offerings are deemed to be ''restricted securities'' for purposes of resale under Rule 144. As a result, schemes involving price manipulation to defraud unknowing investors in the immediate resale of securities purchased directly from issuers (colloquially referred to as ''pump and dump'' schemes) [265] are not the types of fraud we believe are likely to occur in Rule 506(c) offerings, given the holding period requirement in Rule 144(d) and other structural impediments, such as restricted transfer legends on stock certificates.

The risks to investors of fraudulent offerings conducted under Rule 506(c) may be mitigated to some extent by the requirement that issuers sell only to accredited investors (and take reasonable steps to verify such status), who, by virtue of meeting the requirements of the definition, may be better able to assess their ability to take financial risks and bear the risk of loss than investors who are not accredited investors. Issuers will still be subject to the antifraud provisions under the federal securities laws, and the public nature of these solicitations may also facilitate detection of fraudulent activity in that the fraudulent nature of some offerings may be inferred from particular statements contained in solicitation materials, for example, representations of guaranteed high rates of return.

Several commenters asserted that satisfying the definition of accredited investor does not equate to financial sophistication and that it is questionable whether accredited investors will be better able to identify the financial risks

[252] *See* letters from Consumer Federation; Fund Democracy; IDC.

[253] *See* Andrew Patton, Tarun Ramadorai, and Michael Streatfield, *Change You Can Believe In? Hedge Fund Data Revisions* (Duke University, Working Paper, 2013). *But see* letter from MFA (June 20, 2013) (questioning the reliability of the underlying data used in the study).

[254] *See* George Aragon and Vikram Nanda, *Strategic Delays and Clustering in Hedge Fund Reported Returns* (Arizona State University, Working Paper, 2013).

[255] *See* Vikas Agarwal, Naveen Daniel, and Naranyan Naik, *Do Hedge Funds Manage Their Reported Returns?,* 24 Review of Financial Studies 3282 (2011).

[256] *See* Staff Report on Hedge Funds.

[257] *See* Vladimir Atanasov, Vladimir Ivanov, and Kate Litvak, *Does Reputation Limit Opportunistic Behavior in the VC Industry? Evidence From Litigation Against VCs,* 67 Journal of Finance 2215 (2012).

[258] *See* letters from Consumer Federation; Fund Democracy; Sen. Levin.

[259] *See* Release No. 33–6949.

[260] *See* Release No. 33–7644.

[261] 17 CFR 230.144.

[262] *Revision of Rule 504 of Regulation D, the ''Seed Capital'' Exemption,* Release No. 33–7541 (May 21, 1998) [63 FR 29168 (May 28, 1998)].

[263] *Id.* at 29169.

[264] *Id.*

[265] *See, e.g.,* Testimony of Arthur Levitt, Chairman, U.S. Securities and Exchange Commission, before the Permanent Subcommittee on Investigations, Senate Committee on Governmental Affairs, Sept. 22, 1997; *SEC* v. *Huttoe,* Litigation Release No. 15237 (Jan. 31, 1997), 63 SEC Docket 2383 (Mar. 4, 1997); *SEC* v. *Spencer,* Litigation Release No. 14856 (Mar. 29, 1996), 61 SEC Docket 1960 (Apr. 30, 1996), and Litigation Release No. 15042 (Sept. 12, 1996), 62 SEC Docket 2409 (Oct. 8, 1996).

of the offerings and detect fraudulent offerings as compared to non-accredited investors.[266] They also noted that the income test and the net worth test have been significantly eroded by inflation. These commenters also stated that not all general solicitation activities are widely known or accessible, and that fraudulent offerings sold through telemarketing calls and email solicitations, for example, will be difficult if not impossible to detect until after significant damage has occurred.

4. Indirect Effects on Other Markets

Although Rule 506(c) will directly affect the private offering market, it could also have an indirect effect on other markets. The lower search costs associated with finding Rule 506(c) offerings may cause some investors that currently invest in public equity and debt markets or other non-registered offering markets to reallocate capital to offerings made under Rule 506(c). If a significant number of investors make a greater proportion of their investments in Rule 506(c) offerings, such investor behavior may reduce the supply of capital and prices in the public equity and debt markets and in other non-registered offering markets. For example, issuers currently using the exemptions in Regulation A under the Securities Act[267] and in Rules 504(b)(1)(i) through (iii) of Regulation D[268] to solicit investors could prefer to rely on the exemption under Rule 506(c) because they would be able to raise unlimited amounts of capital under Rule 506(c) and state blue sky securities registration requirements do not apply to Rule 506(c) offerings.[269] Although it is difficult to estimate how many of these issuers will choose to rely on Rule 506(c) in lieu of other available exemptions from registration, we believe that it is likely that Rule 506(c) will have a larger impact on issuers using Rule 504 rather than Regulation A because very few issuers have been using the Regulation A exemption in recent years.[270] In addition, to the extent that accredited investors have invested in registered investment companies instead of private funds because of information asymmetry between private funds and registered investment companies, it is possible that registered investment companies' assets may decrease if these investors now transfer their assets to private funds. Because we cannot predict how issuers will use the various exemptions from registration after the elimination of the prohibition against general solicitation in Rule 506(c) offerings, we cannot quantify these potential effects.

5. Retention of Rule 506(b)

We believe that retaining existing Rule 506(b) will have benefits for both issuers and investors. It will allow issuers that do not wish to generally solicit in their private offerings to avoid the added expense of complying with the rules applicable to Rule 506(c) offerings. It will also allow issuers to continue selling privately to up to 35 non-accredited investors who meet existing Rule 506's sophistication requirements. The continued availability of Rule 506(b) may also be beneficial to investors with whom the issuer has a pre-existing substantive relationship and who do not wish to bear additional verification costs that may be associated with participation in Rule 506(c) offerings. All but one commenter supported the Commission's decision to retain Rule 506(b).[271]

D. Verifying Accredited Investor Status in Rule 506(c) Offerings

As there is no information available to us on the costs currently incurred by issuers to form a reasonable belief that a purchaser in a Rule 506 offering is an accredited investor, we are unable to quantify the estimated costs and benefits of the verification requirement in Rule 506(c). Comments from the public on this issue also did not provide any estimates.

The requirement in Rule 506(c) for issuers to take reasonable steps to verify that purchasers are accredited investors will likely make it more difficult for issuers to sell securities to non-accredited investors. This, in turn, may reduce the likelihood that fraudulent offerings would be completed because those who are eligible to purchase are more likely to be able to protect their interests than investors who are not accredited investors. Issuers would also benefit from measures that improve the integrity and reputation of the Rule 506(c) market because the measures would facilitate investor participation, which could result in issuers having greater access to capital.

The verification requirement in Rule 506(c) would impose costs as well. Because the requirement is to take ''reasonable'' steps to verify, and not every conceivable step to verify, it is possible that some investors in Rule 506(c) will not be accredited investors, even if the issuer takes reasonable steps to verify their status as accredited investors. If so, then these investors will participate in offerings for which they are not qualified and that may not be appropriate for them, thereby resulting in a potentially inefficient allocation of capital for these investors. These investors could also face an additional cost in the form of heightened risk of significant losses on their investments, which they may not be able to manage or diversify in a way that accredited investors could.

In addition, some potential investors likely would have to provide more information to issuers than they currently provide, while issuers may have to apply a stricter and more costly process to determine accredited investor status than what they currently use. While commenters provided us with examples of the methods currently used by issuers in the Rule 506 market to collect information about purchasers, they did not provide any data on the costs of these methods. While it is reasonable to expect that the costs associated with the verification requirement could be offset somewhat by its benefits, it is also reasonable to expect that some accredited investors who would participate in existing Rule 506(b) offerings would decline to participate in Rule 506(c) offerings in light of the verification requirement.

To the extent that issuers require investors to provide personally identifiable information (*e.g.,* Social Security numbers, tax information, bank or brokerage account information) in order to verify their accredited investor status, these investors may be reluctant to do so in the context of making an investment in an issuer, particularly an issuer with which they may have no prior relationship.[272] In addition to concerns about maintaining personal privacy, investors may be concerned that their personally identifiable information could be stolen or accessed by third parties or used by

[266] *See, e.g.,* letters from Consumer Federation; Fund Democracy.

[267] 17 CFR 230.251 through 17 CFR 230.263.

[268] 17 CFR 230.504(b)(1)(i)–(iii).

[269] 17 CFR 230.251 through 17 CFR 230.263.

[270] The Ivanov/Bauguess Study reported that 1,852 issuers relied on the Rule 504 exemption to raise capital between 2009 to 2012, and 20 issuers relied on Regulation A. The number of issuers using Regulation A to raise capital may increase once the Commission adopts rules implementing Title IV of the JOBS Act, which directs the Commission to adopt an exemption based on Regulation A to permit offerings of up to $50 million.

[271] *See, e.g.,* letters from ABA Fed. Reg. Comm.; ACA (Sept. 27, 2012); CFIRA; IPA; Montgomery & Hansen; NSBA; NYCBA; S&C; SIFMA and FSR (Oct. 5, 2012). Only one commenter opposed retaining it. Letter from J. McLaughlin (stating that ''[t]here is no basis in the statute for the Commission to continue to apply the prohibition to a set of offerings exempt under Rule 506, especially since the effect of maintaining a parallel rule may have the effect of discouraging some issuers from using general solicitation . . . .'').

[272] *See* letter from SecondMarket Holdings, Inc. (May 25, 2012).

unscrupulous issuers in various ways (*e.g.,* identity theft), which could impose costs to investors that go well beyond the costs typically associated with investing. As a consequence, some potential investors may elect not to participate in Rule 506(c) offerings, thus impeding capital formation to some extent.

Our decision not to specify the verification methods that an issuer must use in taking reasonable steps to verify accredited investor status would provide issuers with the flexibility to use methods that are appropriate in light of the facts and circumstances of each offering and each purchaser. Such flexibility could mitigate the cost to issuers of complying with Rule 506(c) because it would allow them to select the most cost-effective verification method for each offering. We anticipate, however, that issuers or their verification service providers will document the particular verification methods used in the event of any question being raised about the availability of the exemption. Although we do not specify the nature or extent of any such documentation, we acknowledge that it will create some cost.

On the other hand, the greater flexibility of the principles-based ''reasonableness'' verification method could result in less rigorous verification, thus allowing some unscrupulous issuers to more easily sell securities to purchasers who are not accredited investors and perpetrate fraudulent schemes, or it could create or promote legal uncertainty about the availability of Rule 506(c), which may cause some issuers to interpret ''reasonable steps to verify'' in a manner that is more burdensome than if specific verification methods were prescribed, thus incurring higher cost. We believe that the non-exclusive list of specific methods of verification we are including in Rule 506(c), as adopted, should help to mitigate the impact of these costs.

Some commenters suggested that using a flexible verification standard is optimal for issuers because it closely resembles current market practices which they believe have worked well in this market.[273] Such flexibility will allow issuers to adopt different approaches based on the types of accredited investors, types of offerings and changing market practices. In contrast, other commenters questioned the benefits of the flexibility provided by the principles-based verification method and criticized the Commission for not quantifying the costs and benefits of currently used verification methods.[274] They argued that the application of the reasonableness standard in the principles-based method will lead to lax verification practices by issuers, which would lessen investor protection by allowing sales of securities to non-accredited investors.

Our decision to provide a non-exclusive list of specified methods that issuers can use to verify a purchaser's accredited investor status will provide legal certainty in those circumstances in which there is a question as to whether or not the steps taken are reasonable in light of the facts and circumstances. Using a specified method would reduce issuers' verification costs to the extent that they would otherwise incur costs to analyze whether or not the steps they had taken or proposed to take satisfied the reasonableness standard in Rule 506(c). It could also reduce investors' costs, since the methods for verifying income and net worth rely mostly on documents prepared by third parties at no cost to the investors. On the other hand, some investors may be reluctant to provide the personal financial information required by the income and net worth methods; and with respect to the third-party method, it may be relatively costly to pay for the verification services of a lawyer or accountant as they may be concerned about professional liability. The grandfather method—which permits self-certification by existing investors who purchased securities as accredited investors in an issuer's Rule 506(b) offering before the effective date of Rule 506(c)—could result in investors that do not meet the definition of ''accredited investor'' participating in Rule 506(c) offerings because issuers conducting Rule 506(b) offerings are not required to take reasonable steps to verify the accredited investor status of their purchasers.

In addition, our non-exclusive list of specified verification methods could be mistakenly viewed by market participants as the required verification methods, in which compliance with at least one of the enumerated methods could be viewed, in the practical application of the verification requirement, as necessary in all circumstances to demonstrate that the verification requirement has been satisfied, thereby eliminating the flexibility that Rule 506(c) is intended to provide.[275] If issuers choose not to use verification methods different from those on the non-exclusive list, then some potential investors may limit their participation in the Rule 506(c) market, which may impede capital formation to some extent. Finally, even if a specified method has been used, thereby satisfying the verification requirement, there may be circumstances in which issuers may unreasonably overlook or disregard other information indicating that a purchaser is not, in fact, an accredited investor. This could lead to sales being made to persons who are not accredited investors. Because, as stated above, the Commission does not have data on current verification practices, we cannot quantify the effect of the new verification requirement in Rule 506(c).

E. Analysis of the Amendment to Rule 144A

We expect the potential benefits of the amendments to Rule 144A to be lower (*i.e.,* less available) for issuers in Rule 144A offerings as compared to issuers in Rule 506(c) offerings because QIBs, which are the only permitted investors in Rule 144A offerings, are generally fewer in number, known by market participants, and better networked than accredited investors. Thus, as we noted in the Proposing Release, we believe that eliminating the prohibition against general solicitation for Rule 144A offerings is unlikely to dramatically increase issuers' access to QIBs in such offerings or to lower the cost of capital in Rule 144A offerings.

We expect that there would be fewer potential occurrences of general solicitation-induced fraud in Rule 144A offerings, as compared to Rule 506(c) transactions, because Rule 144A offerings involve an intermediary that, as the initial purchaser of the securities, typically performs a due diligence investigation and assists the issuer in preparing the offering materials, thereby adding a layer of protection against fraud. Also, Rule 144A investors are generally large institutions, which are thought to be better able to identify fraudulent activities than smaller institutions and retail investors in general.

We also anticipate that eliminating the prohibition against general solicitation would significantly affect private trading systems by permitting information vendors to provide more information about Rule 144A securities. Indeed, because offers will be able to be made to the public, the information on private trading systems for Rule 144A

[273] *See* letters from SIFMA and FSR (Oct. 5, 2012); and IAA.

[274] *See* letters from Consumer Federation; Fund Democracy.

[275] The use of any of the specified methods is optional. We expect that many issuers will conduct Rule 506(c) offerings in reliance on the principles-based method of verification, in light of its flexibility and efficiency.

securities could be made available to all investors, even though sales would be limited to QIBs.[276] In addition, currently there is no public dissemination through Trade Reporting and Compliance Engine (''TRACE'') of transactions in Rule 144A securities.[277] Now that Rule 144A is being amended to permit offers to be made to persons other than QIBs, transaction information with respect to Rule 144A securities can be publicly disseminated. Such improvements in the information available to potential investors could enhance efficiency in the Rule 144A market.

F. Additional Information Collection and Disclosures

We are amending Form D to add a new check box in Item 6 of Form D that will require an issuer to indicate whether it is relying on Rule 506(c) in conducting its offering. With this information, the Commission will be able to more effectively analyze the use of Rule 506(c). The marginal cost to issuers of providing this information is likely to be low because Form D already requires issuers to identify the exemption on which they are relying. Commenters generally supported the proposal to have a new check box in Item 6 of Form D as a way to identify Rule 506(c) offerings.[278] One commenter, however, questioned the usefulness of the information provided by the new check box.[279]

Much of what we know about the size and characteristics of the private offering market comes from Form D filings. The information collected to date and described in this release illustrates and underscores the importance of the private offering market to the U.S. economy. The continued collection of this information following the elimination of the prohibition against general solicitation in Rule 506(c) and Rule 144A offerings will be an important tool in assessing the ongoing economic impact of the new rule amendments.

VII. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis (''FRFA'') has been prepared in accordance with Section 603 of the Regulatory Flexibility Act.[280] It relates to the amendments to Rules 500, 501, 502 and 506 of Regulation D, Form D and Rule 144A that we are adopting in this release. An Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with the Regulatory Flexibility Act and included in the Proposing Release.

A. Reasons for, and Objectives of, the Action

The primary reason for, and objective of, the amendments to Rule 502 and Rule 506 is to implement the statutory requirements of Section 201(a)(1) of the JOBS Act, which directs the Commission to revise Rule 506 to provide that the prohibition against general solicitation in Rule 502(c) shall not apply to offers and sales of securities made pursuant to Rule 506, provided that all purchasers of the securities are accredited investors. Consistent with the language in Section 201(a), the amendment to Rule 506 requires issuers to take reasonable steps to verify that purchasers in any Rule 506 offering using general solicitation are accredited investors. The primary reason for, and objective of, the amendment to Form D is to assist our efforts to analyze the use of general solicitation in Rule 506(c) offerings and the size of this offering market.

The primary reason for, and objective of, the final amendment to Rule 144A is to implement the statutory requirements of Section 201(a)(2) of the JOBS Act, which directs the Commission to revise Rule 144A(d)(1) to provide that securities sold pursuant to Rule 144A may be offered to persons other than QIBs, including by means of general solicitation, provided that securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe are QIBs.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on any aspect of the IRFA, including the number of small entities that would be subject to the proposed rule and form amendments and the nature of the effects of the proposed amendments on small entities. We received one comment addressing the IRFA.[281] This commenter stated that the Commission failed in its IRFA to consider the alternative of eliminating Form D or significantly reducing the scope of information required to be disclosed on Form D. As Form D provides meaningful information about the Regulation D market, and our need for information about this market will only increase once Rule 506(c) is in effect, we are not considering eliminating Form D or significantly reducing the scope of information required to be disclosed on Form D.

C. Small Entities Subject to the Final Rule and Form Amendments

For purposes of the Regulatory Flexibility Act, under our rules, an issuer, other than an investment company, is a ''small business'' or ''small organization'' if it has total assets of $5 million or less as of the end of its most recent fiscal year and is engaged or proposing to engage in an offering of securities which does not exceed $5 million.[282] For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[283]

Rule 506(c) will affect small issuers (including both operating businesses and investment funds that raise capital under Rule 506) relying on this exemption from Securities Act registration. All issuers that sell securities in reliance on Regulation D are required to file a Form D with the Commission reporting the transaction. For the year ended December 31, 2012, 16,067 issuers made 18,187 new Form D filings, of which 15,208 issuers relied on the Rule 506 exemption. Based on the information reported by issuers on Form D, there were 3,958 small issuers[284] relying on the Rule 506 exemption in 2012. This number likely underestimates the actual number of small issuers relying on the Rule 506 exemption, however, because over 60% of issuers that are not pooled investment funds and over 80% of issuers that are pooled investment funds declined to report their amount of revenues in 2012.

The final amendment to Rule 144A will affect small entities that engage in

[276] Under the PORTAL Trading System developed by the Nasdaq Stock Market for trading Rule 144A securities, access is restricted to QIBs. Other privately developed Rule 144A trading systems, such as Portal Alliance, have similar restrictions.

[277] *See* FINRA Rule 6750. There is mandatory reporting of over-the-counter trades in fixed income securities. On April 19, 2013, the FINRA Board of Governors announced that it has authorized FINRA to file with the Commission ''proposed amendments to FINRA Rules 6750 and 7730 to provide for the dissemination of transactions in TRACE-eligible securities effected pursuant to Securities Act Rule 144A (Rule 144A transactions).'' *See* Letter from Richard G. Ketchum, Chairman and CEO, FINRA (Apr. 19, 2013), *available at: http://www.finra.org/Industry/Regulation/Guidance/CommunicationstoFirms/P244913*.

[278] *See* letters from MFA (Sept. 28, 2012); SIFMA and FSR (Oct. 5, 2012); IAA.

[279] *See* letter from Consumer Federation.

[280] *See* 5 U.S.C. 603.

[281] *See* letter from K. Bishop.

[282] 17 CFR 230.157.

[283] 17 CFR 270.0–10(a).

[284] Of this number, 3,627 of these issuers are not investment companies, and 331 are investment companies. We also note that issuers that are not investment companies disclose only revenues on Form D, and not total assets. Hence, we use the amount of revenues as a measure of issuer size.

Rule 144A offerings.[285] Unlike issuers that use Regulation D, issuers conducting Rule 144A offerings are not required to file any form with the Commission. This lack of data significantly limits our ability to assess the number and the size of issuers that conduct Rule 144A offerings. Still, we are able to obtain some data on non-ABS Rule 144A offerings during the 2009 to 2012 period from two commercial databases.[286] Based on these data, we identified 3,510 offerings involving 1,965 issuers from 2009 to 2012. We were able to obtain 2011 financial information for 598 of these issuers,[287] of which only 11 issuers reported total assets of less than $50 million.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The final amendment to Rule 506 will impose certain reporting and compliance requirements on issuers that engage in general solicitation in Rule 506 offerings. As discussed above, issuers taking advantage of Rule 506(c) to engage in general solicitation in Rule 506 offerings will be required to take reasonable steps to verify that the purchasers of the securities are accredited investors. The steps required will vary with the circumstances, but we anticipate that some potential investors may have to provide more information to issuers than they currently provide, while issuers may have to apply a stricter and more costly process to verify accredited investor status than what they currently use. We expect that the costs of compliance will vary depending on the size and nature of the offering, the nature and extent of the verification methods used, and the number and nature of purchasers in the offering. Rule 506(c) does not impose any recordkeeping requirements; however, we anticipate that issuers or their verification service providers will document the steps taken to verify that purchasers are accredited investors in Rule 506 offerings involving general solicitation because the issuer has the burden of demonstrating that its offering is entitled to an exemption from the registration requirements of Section 5 of the Securities Act. To promote legal certainty, we are including in Rule 506(c) a non-exclusive list of verification methods that in and of themselves will be deemed to satisfy the verification requirement.

The final amendment to Form D will also impose an information requirement with respect to Rule 506 offerings that use general solicitation. Each issuer submitting a Form D for a Rule 506 offering will be required to check a box on the form to indicate whether the issuer is relying on the Rule 506(c) exemption. We do not believe that this revision to Form D will increase in any material way the time or information required to complete the Form D that must be filed with the Commission in connection with a Rule 506 offering.

The final amendment to Rule 144A contains no reporting, recordkeeping or compliance requirements for issuers that engage in Rule 144A offerings.

E. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap or conflict with the final amendments to Rule 144A, Form D, and Rules 500, 501, 502 and 506 of Regulation D.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives of our amendments, while minimizing any significant adverse impact on small entities. In regard to the final amendment to Rule 144A and the final amendment to Rule 506 to remove the prohibition against general solicitation in Rule 506 offerings where all purchasers are accredited investors and issuers have taken reasonable steps to verify purchasers' accredited investor status, there are no significant alternatives to these amendments that would accomplish the stated objectives of Section 201(a) of the JOBS Act. Eliminating the prohibition against general solicitation for a subset of Rule 506 offerings is intended to assist small entities—and other entities—seeking to raise capital. Small entities are not required to use Rule 506(c) to raise capital and would do so presumably only if it would be useful to them.

In connection with the final amendment to Form D and the final amendment to Rule 506 that requires issuers to take reasonable steps to verify that purchasers of securities are accredited investors, the Commission considered the following alternatives: (1) Establishing different compliance or reporting standards that take into account the resources available to small entities; (2) clarifying, consolidating or simplifying compliance requirements under the rule; (3) using design rather than performance standards; and (4) exempting small entities from coverage of all or part of the amendment to Rule 506.

With respect to using design rather than performance standards, we note that the ''reasonable steps to verify'' requirement in Rule 506(c) is a performance standard. We believe that the flexibility of a performance standard accommodates different types of offerings and purchasers without imposing overly burdensome methods that may be ill-suited or unnecessary to a particular offering or purchaser, given the facts and circumstances. The Commission is not adopting different compliance or reporting requirements or timetables for small entities under Rule 506(c). The particular steps necessary to meet the requirement to take reasonable steps to verify that purchasers are accredited investors will vary according to the circumstances. Different compliance requirements for small entities may create the risk that the requirements may be too prescriptive or, alternatively, insufficient to verify a purchaser's accredited investor status. Special requirements for small entities may also lead to investor confusion or reduced investor participation in Rule 506 offerings if they create the impression that small entities have a different standard of verification than other issuers of securities. As the verification requirement is intended to protect investors by limiting participation in unregistered offerings to those who are most able to bear the risk, we are of the view that a flexible standard applicable to all issuers better accomplishes the goal of investor protection that this requirement is intended to serve. At the same time, the non-exclusive list of verification methods that we are including in the final rule will provide additional legal certainty to all issuers, including small entities. The Commission is not adopting a different reporting requirement for small entities because the additional information that will be required in Form D is minimal and should not be unduly burdensome or costly for small entities.

We similarly believe that it does not appear consistent with the objective of the final amendments or the considerations described above regarding investor confusion and investor participation to further clarify, consolidate or simplify the amendments for small entities. With respect to

[285] While it may be theoretically possible for a small entity to meet one part of the definition of ''qualified institutional buyer'' (*e.g.,* an ''entity, all of the equity owners of which are qualified institutional buyers, acting for its own account or the accounts of other qualified institutional buyers''), we do not have any information to suggest that there are such small entities. Accordingly, the regulatory flexibility analysis in regard to Rule 144A is focused on small issuers that engage in Rule 144A offerings.

[286] These databases are Thomson Financial's SDC Platinum Service and Sagient Research System's Placement Tracker database.

[287] Financial data for fiscal year 2011 was obtained from Compustat, a product of Standard and Poor's.

exempting small entities from coverage of these final amendments, we believe such an approach would be contrary to the requirements of, and the legislative intent behind, Section 201(a) of the JOBS Act, as evidenced by the plain language of the statute.

VIII. Statutory Authority and Text of Final Rule and Form Amendments

The final amendments contained in this release are being adopted under the authority set forth in Sections 4(a)(1), 4(a)(2), 7, 17(a), 19 and 28 of the Securities Act, as amended, Sections 2, 3, 9(a), 10, 11A(c), 12, 13, 14, 15(c), 15(g), 17(a), 23(a) and 30 of the Exchange Act, as amended, Sections 23, 30 and 38 of the Investment Company Act, as amended, and Section 201(a) of the JOBS Act.[288]

List of Subjects in 17 CFR Parts 230, 239 and 242

Reporting and recordkeeping requirements, Securities.

For the reasons set out above, the Commission is amending Title 17, chapter II of the Code of Federal Regulations, as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 1. The general authority citation for Part 230 is revised to read as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77d note, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78*o*, 78*o*-7 note, 78t, 78w, 78*ll* (d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. 112–106, sec. 201(a), 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

§ 230.144A [Amended]

■ 2. Amend § 230.144A by:
■ a. In Preliminary Note 7, removing the reference to ''section 4(2)'' and adding in its place ''section 4(a)(2)'';
■ b. In paragraph (a)(1)(i)(A), removing the reference to ''section 2(13)'' and adding in its place ''section 2(a)(13)'';
■ c. In paragraph (b), removing the reference to ''sections 2(11) and 4(1)'' and adding in its place ''sections 2(a)(11) and 4(a)(1)'';
■ d. In paragraph (c), removing the references to ''section 4(3)(C)'', ''section 2(11)'' and ''section 4(3)(A)'' and adding in their place ''section 4(a)(3)(C)'', ''section 2(a)(11)'' and ''section 4(a)(3)(A),'' respectively;
■ e. In paragraph (d)(1), first sentence, removing the phrase ''offered or''; and
■ f. In paragraph (d)(1), first sentence, removing the phrase ''an offeree or'' and adding in its place ''a''.

§ 230.500(c) [Amended]

■ 3. Amend § 230.500(c) by:
■ a. Removing the reference to ''section 4(2)'' and adding in its place ''section 4(a)(2)''; and
■ b. In the second sentence, adding ''(b)'' after ''rule 506'' and after ''(§ 230.506''.

§ 230.501 [Amended]

■ 4. Amend § 230.501 by:
■ a. In paragraph (a)(1), removing the reference to ''section 2(13)'' and adding in its place ''section 2(a)(13)''; and
■ b. In paragraph (g), removing the reference to ''section 2(4)'' and adding in its place ''section 2(a)(4)''.

§ 230.502 [Amended]

■ 5. Amend § 230.502 by:
■ a. In paragraphs (b)(1), (b)(2)(iv), (b)(2)(v) and (b)(2)(vii), removing the reference to ''§ 230.506'' and adding in its place ''§ 230.506(b)'';
■ b. In paragraph (c), first sentence, adding the phrase ''or § 230.506(c)'' after the phrase ''Except as provided in § 230.504(b)(1)'';
■ c. In paragraph (d), removing the reference to ''section 4(2)'' and adding in its place ''section 4(a)(2)''; and
■ d. In paragraph (d), removing the reference to ''section 2(11)'' and adding in its place ''section 2(a)(11).''
■ 6. Amend § 230.506 by:
■ a. In paragraph (a), adding the phrase ''or (c)'' after the phrase ''satisfy the conditions in paragraph (b)'';
■ b. In paragraph (a), removing the phrase ''section 4(2)'' and adding in its place ''section 4(a)(2)'';
■ c. In the heading of paragraph (b), adding the phrase ''*in offerings subject to limitation on manner of offering*'' after the phrase ''*Conditions to be met'';*
■ d. In the note following paragraph (b)(2)(i), removing the phrase ''this section'' and adding in its place ''paragraph (b) of this section''; and
■ e. Adding paragraph (c) to read as follows:

§ 230.506 Exemption for limited offers and sales without regard to dollar amount of offering.

* * * * *

(c) *Conditions to be met in offerings not subject to limitation on manner of offering*—(1) *General conditions.* To qualify for exemption under this section, sales must satisfy all the terms and conditions of §§ 230.501 and 230.502(a) and (d).

(2) *Specific conditions*—(i) *Nature of purchasers.* All purchasers of securities sold in any offering under paragraph (c) of this section are accredited investors.

(ii) *Verification of accredited investor status.* The issuer shall take reasonable steps to verify that purchasers of securities sold in any offering under paragraph (c) of this section are accredited investors. The issuer shall be deemed to take reasonable steps to verify if the issuer uses, at its option, one of the following non-exclusive and non-mandatory methods of verifying that a natural person who purchases securities in such offering is an accredited investor; provided, however, that the issuer does not have knowledge that such person is not an accredited investor:

(A) In regard to whether the purchaser is an accredited investor on the basis of income, reviewing any Internal Revenue Service form that reports the purchaser's income for the two most recent years (including, but not limited to, Form W–2, Form 1099, Schedule K–1 to Form 1065, and Form 1040) and obtaining a written representation from the purchaser that he or she has a reasonable expectation of reaching the income level necessary to qualify as an accredited investor during the current year;

(B) In regard to whether the purchaser is an accredited investor on the basis of net worth, reviewing one or more of the following types of documentation dated within the prior three months and obtaining a written representation from the purchaser that all liabilities necessary to make a determination of net worth have been disclosed:

(*1*) With respect to assets: Bank statements, brokerage statements and other statements of securities holdings, certificates of deposit, tax assessments, and appraisal reports issued by independent third parties; and

(*2*) With respect to liabilities: A consumer report from at least one of the nationwide consumer reporting agencies; or

(C) Obtaining a written confirmation from one of the following persons or entities that such person or entity has taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that such purchaser is an accredited investor:

(*1*) A registered broker-dealer;

(*2*) An investment adviser registered with the Securities and Exchange Commission;

(*3*) A licensed attorney who is in good standing under the laws of the

[288] Although 15 U.S.C. 77d note is not an authority for the amendments in this release, it is being included in the instruction below for the general authority citation for Part 230 to ensure that the Code of Federal Regulations is correctly updated for purposes of the bad actor disqualification rule for Rule 506 offerings also published today. *See* Bad Actor Release.

jurisdictions in which he or she is admitted to practice law; or

(*4*) A certified public accountant who is duly registered and in good standing under the laws of the place of his or her residence or principal office.

(D) In regard to any person who purchased securities in an issuer's Rule 506(b) offering as an accredited investor prior to September 23, 2013 and continues to hold such securities, for the same issuer's Rule 506(c) offering, obtaining a certification by such person at the time of sale that he or she qualifies as an accredited investor.

Instructions to paragraph (c)(2)(ii)(A) through (D) of this section:

1. The issuer is not required to use any of these methods in verifying the accredited investor status of natural persons who are purchasers. These methods are examples of the types of non-exclusive and non-mandatory methods that satisfy the verification requirement in § 230.506(c)(2)(ii).

2. In the case of a person who qualifies as an accredited investor based on joint income with that person's spouse, the issuer would be deemed to satisfy the verification requirement in § 230.506(c)(2)(ii)(A) by reviewing copies of Internal Revenue Service forms that report income for the two most recent years in regard to, and obtaining written representations from, both the person and the spouse.

3. In the case of a person who qualifies as an accredited investor based on joint net worth with that person's spouse, the issuer would be deemed to satisfy the verification requirement in § 230.506(c)(2)(ii)(B) by reviewing such documentation in regard to, and obtaining written representations from, both the person and the spouse.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 7. The authority citation for Part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l,* 78m, 78n, 78*o*(d), 78o–7 note, 78u–5, 78w(a), 78*ll,* 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

■ 8. Amend Form D (referenced in § 239.500) by:

■ a. In Item 6, removing the phrase ''Rule 506'' and adding in its place ''Rule 506(b)'' next to the appropriate check box, and removing the phrase ''Securities Act Section 4(5)'' and adding in its place ''Securities Act Section 4(a)(5)'' next to the appropriate check box;

■ b. In Item 6, adding a check box that reads ''Rule 506(c)'' after the newly redesignated Rule 506(b) check box; and

■ c. In the instruction ''Who must file:'', removing the reference to ''Section 4(5)'' and adding in its place ''Section 4(a)(5).''

(**Note:** The text of Form D does not, and the amendments will not, appear in the Code of Federal Regulations.)

PART 242—REGULATIONS M, SHO, ATS, AC, AND NMS AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 9. The authority citation for Part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l,* 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

§ 242.101 [Amended]

■ 10. Amend § 242.101 by:

■ a. In paragraph (b)(10) introductory text, removing the phrase ''offered or''; and

■ b. In paragraph (b)(10)(i), removing the phrase ''offerees or''.

§ 242.102 [Amended]

■ 11. Amend § 242.102 by:

■ a. In paragraph (b)(7) introductory text, removing the phrase ''offered or''; and

■ b. In paragraph (b)(7)(i), removing the phrase ''offerees or''.

§ 242.104 [Amended]

■ 12. Amend § 242.104 by:

■ a. In paragraph (j)(2) introductory text, removing the phrase ''offered or''; and

■ b. In paragraph (j)(2)(i), removing the phrase ''offerees or''.

By the Commission.

Dated: July 10, 2013.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–16883 Filed 7–23–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 239

[Release No. 33–9416; Release No. 34–69960; Release No. IC–30595; File No. S7–06–13]

RIN 3235–AL46

Amendments to Regulation D, Form D and Rule 156

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: The Securities and Exchange Commission, which today in separate releases amended Rule 506 of Regulation D, Form D and Rule 144A under the Securities Act of 1933 to implement Section 201(a) of the Jumpstart Our Business Startups Act and Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, is publishing for comment a number of proposed amendments to Regulation D, Form D and Rule 156 under the Securities Act. These proposed amendments are intended to enhance the Commission's ability to evaluate the development of market practices in Rule 506 offerings and to address concerns that may arise in connection with permitting issuers to engage in general solicitation and general advertising under new paragraph (c) of Rule 506. Specifically, the proposed amendments to Regulation D would require the filing of a Form D in Rule 506(c) offerings before the issuer engages in general solicitation; require the filing of a closing amendment to Form D after the termination of any Rule 506 offering; require written general solicitation materials used in Rule 506(c) offerings to include certain legends and other disclosures; require the submission, on a temporary basis, of written general solicitation materials used in Rule 506(c) offerings to the Commission; and disqualify an issuer from relying on Rule 506 for one year for future offerings if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with Form D filing requirements in a Rule 506 offering. The proposed amendments to Form D would require an issuer to include additional information about offerings conducted in reliance on Regulation D. Finally, the proposed amendments to Rule 156 would extend the antifraud guidance contained in the rule to the sales literature of private funds.

DATES: Comments should be received on or before September 23, 2013.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an email to *rule-comments@sec.gov*. Please include File Number S7–06–13 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–06–13. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Charles Kwon, Special Counsel or Ted Yu, Senior Special Counsel, Office of Chief Counsel, or Karen C. Wiedemann, Attorney Fellow, Office of Small Business Policy, Division of Corporation Finance, at (202) 551–3500; or, with respect to private funds, Melissa Gainor or Alpa Patel, Senior Counsels, Investment Adviser Regulation Office, Division of Investment Management, at (202) 551–6787, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to Rule 156,[1] Rules 503,[2] 506[3] and 507[4] of Regulation D,[5] and Form D[6] under the Securities Act of 1933.[7] We are proposing to add Rule 509 and Rule 510T of Regulation D under the Securities Act.

[1] 17 CFR 230.156.

[2] 17 CFR 230.503.

[3] 17 CFR 230.506.

[4] 17 CFR 230.507.

[5] 17 CFR 230.500 through 230.508.

[6] 17 CFR 239.500.

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[7] 15 U.S.C. 77a *et seq.*

I. Introduction

We are adopting today, in separate releases, amendments to Rule 506 of Regulation D [8] and to Form D [9] to implement Section 201(a)(1) of the Jumpstart Our Business Startups Act (the ''JOBS Act'') [10] and Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'').[11] Rule 506 was originally adopted as a non-exclusive safe harbor under Section 4(a)(2) of the Securities Act of 1933 (the ''Securities Act''), the statutory exemption from Securities Act registration for transactions by an issuer ''not involving any public offering.'' [12]

To implement Section 201(a)(1) of the JOBS Act, we are adding new paragraph (c) to Rule 506, which permits issuers to use general solicitation and general advertising (collectively, ''general solicitation'') when conducting an offering pursuant to this new paragraph, provided that all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify that such purchasers are accredited investors.[13] We are also adding a new check box to Form D to require issuers to indicate that they are relying on Rule 506(c) for their offering.[14] To implement Section 926 of the Dodd-Frank Act, we are adding new paragraph (d) to Rule 506, which disqualifies issuers and other market participants from relying on Rule 506 if ''felons and other 'bad actors' '' are participating in the offering.[15] We are also amending the form of the signature block to Form D to include a certification whereby issuers claiming a Rule 506 exemption will confirm that the offering is not disqualified from reliance on Rule 506.

We anticipate that new Rule 506(c) will have a significant impact on Rule 506 offerings and on current capital-raising practices. Among other things, we anticipate that issuers using Rule 506(c) will be able to reach a greater number of potential investors than is currently the case in Rule 506 offerings, thereby increasing their access to sources of capital.[16] As a result, accredited investors may be able to find and potentially invest in a larger and more diverse pool of investment opportunities, which could result in a more efficient allocation of capital by accredited investors. On the other hand, we recognize the concerns raised by a number of commenters that a general solicitation for a Rule 506(c) offering would attract both accredited and non-accredited investors and could result in an increase in fraudulent activity in the Rule 506 market, as well as an increase in unlawful sales of securities to non-accredited investors.

Many comments submitted on the Rule 506(c) Proposing Release, including the comments submitted by the Investor Advisory Committee, urged the Commission to propose or adopt other amendments to Regulation D or to Form D [17] that they believed would be appropriate in connection with the adoption of the amendments to implement Section 201(a) of the JOBS Act.[18] For example, several commenters suggested that we amend Regulation D to provide that the availability of the new Rule 506(c) exemption be conditioned on compliance with the

[8] 17 CFR 230.506. The Commission adopted Rule 506 and Regulation D in 1982 as a result of the Commission's evaluation of the impact of its rules on the ability of small businesses to raise capital. *See Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales,* Release No. 33–6389 (Mar. 8, 1982) [47 FR 11251 (Mar. 16, 1982)]. Over the years, the Commission has revised various provisions of Regulation D in order to address, among other things, specific concerns relating to facilitating capital raising as well as abuses that have arisen under Regulation D. *See, e.g., Additional Small Business Initiatives,* Release No. 33–6996 (Apr. 28, 1993) [58 FR 26509 (May 4, 1993)] and *Revision of Rule 504 of Regulation D, the ''Seed Capital'' Exemption,* Release No. 33–7644 (Feb. 25, 1999) [64 FR 11090 (Mar. 8, 1999)].

[9] 17 CFR 239.500.

[10] Public Law 112–106, sec. 201(a), 126 Stat. 306, 313 (Apr. 5, 2012). *See Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings,* Release No. 33–9354 (Aug. 29, 2012) [77 FR 54464 (Sept. 5, 2012)] (''Rule 506(c) Proposing Release'').

[11] Public Law 111–203, sec. 926, 124 Stat. 1376, 1851 (July 21, 2010) (codified at 15 U.S.C. 77d note).

[12] 15 U.S.C. 77d(a)(2). As with the Section 4(a)(2) statutory exemption, Rule 506 is available only to the issuer of the securities and not to any affiliate of the issuer or to any other person for resales of the issuer's securities. *See* 17 CFR 230.500(d).

[13] *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings,* Release No. 33–9415 (July 10, 2013) (''Rule 506(c) Adopting Release''). In addition to these requirements, under new Rule 506(c), all terms and conditions of Rule 501 and Rules 502(a) and 502(d) of Regulation D [17 CFR 230.501 and 502(a) and (d)] must be satisfied.

[14] As discussed in Section II.A of this release, Form D is the notice of an offering of securities made without registration under the Securities Act in reliance on an exemption provided by Regulation D or Section 4(a)(5) of the Securities Act.

[15] *Disqualification of Felons and Other ''Bad Actors'' from Rule 506 Offerings,* Release No. 33–9414 (July 10, 2013).

[16] Currently, under Rule 506(b) [17 CFR 230.506(b)], an issuer may sell securities, without any limitation on the offering amount, to an unlimited number of ''accredited investors,'' as defined in Rule 501(a) of Regulation D, and to no more than 35 non-accredited investors who meet certain ''sophistication'' requirements. The availability of Rule 506(b) is subject to the terms and conditions of Rules 501 and 502 and is conditioned on the issuer, or any person acting on its behalf, not offering or selling securities through any form of ''general solicitation or general advertising.''

[17] To facilitate public input on JOBS Act rulemaking before the issuance of rule proposals, the Commission invited members of the public to make their views known on various JOBS Act initiatives in advance of any rulemaking by submitting comment letters to the Commission's Web site at *http://www.sec.gov/spotlight/jobsactcomments.shtml.* The comment letters relating to Section 201(a) of the JOBS Act submitted in response to this invitation are located at *http://www.sec.gov/comments/jobs-title-ii/jobs-title-ii.shtml.* The comment letters submitted in response to the Rule 506(c) Proposing Release are located at *http://www.sec.gov/comments/s7-07-12/s70712.shtml.* Many commenters submitted comment letters both before and after the issuance of the Rule 506(c) Proposing Release. Our references to comment letters in this release that are not dated refer to the comment letters submitted in response to the Rule 506(c) Proposing Release. Dated comment letters refer to those submitted before the issuance of the Rule 506(c) Proposing Release or by commenters that submitted multiple letters.

[18] *See, e.g.,* letters from Fund Democracy, Inc. (''Fund Democracy''); North American Securities Administrators Association, Inc. (''NASAA''); Consumer Federation of America (''Consumer Federation''); SEC Investor Advisory Committee (''Investor Advisory Committee''). The Investor Advisory Committee was established in April 2012 pursuant to Section 911 of the Dodd-Frank Act to advise the Commission on regulatory priorities, the regulation of securities products, trading strategies, fee structures, the effectiveness of disclosure, initiatives to protect investor interests and to promote investor confidence and the integrity of the securities marketplace. The Dodd-Frank Act authorizes the Investor Advisory Committee to submit findings and recommendations for review and consideration by the Commission.

On October 12, 2012, the Investor Advisory Committee unanimously approved and submitted recommendations to the Commission titled, *Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Lift the Ban on General Solicitation and Advertising in Rule 506 Offerings: Efficiently Balancing Investor Protection, Capital Formation and Market Integrity.* The recommendations are available at *http://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-general-solicitation-advertising-recommendations.pdf.*

Form D filing requirement,[19] require Form D to be filed in advance of any general solicitation [20] and add to the information requirements of Form D.[21] In light of the fact that the financial thresholds in the definition of ''accredited investor'' that relate to natural persons have not been updated since their adoption in 1982,[22] some commenters recommended that the Commission also amend the definition of ''accredited investor'' as it relates to natural persons.[23] Other commenters suggested that we propose rules governing the content and manner of general solicitations used in offerings conducted pursuant to the new Rule 506(c) exemption, particularly with respect to offerings by private funds.[24] Several commenters also recommended that we require the filing or submission of general solicitation materials used pursuant to the new Rule 506(c) exemption, whether to the Financial Industry Regulatory Authority (''FINRA''),[25] to an electronic ''drop box'' to be created by the Commission specifically to receive general solicitation materials [26] or as an exhibit to Form D.[27]

In light of these comments and the magnitude of the change that the elimination of the prohibition against general solicitation represents to the Rule 506 market, we are proposing today a number of amendments in conjunction with the adoption of new Rule 506(c). These amendments are intended to enhance the Commission's understanding of the Rule 506 market by improving compliance with Form D filing requirements, expanding the information requirements of Form D, primarily with respect to Rule 506 offerings, and requiring the submission, on a temporary basis, of written general solicitation materials used in Rule 506(c) offerings to the Commission. We believe that the elimination of the prohibition against general solicitation for Rule 506(c) offerings will have a significant impact on the Rule 506 market, including the types of issuers that raise capital using Rule 506, the investors who are solicited and ultimately purchase securities in the offerings, the intermediaries that participate in this market, the practices employed by issuers and intermediaries and the amount of capital that will be raised. To review and analyze these changes more effectively, and to facilitate the assessment of the effects of such changes on investor protection and capital formation, the Commission staff will need better tools to evaluate this changing market than are currently provided by the existing filing and information requirements of Form D. Further, we believe that the proposed changes to the filing and information requirements of Form D could assist the enforcement efforts of both federal and state regulators, which rely on Form D as an important source of information about the private offering market.

Specifically, with respect to Form D and to Regulation D as it relates to Form D, we are proposing to:

- Amend Rule 503 of Regulation D to require: (1) The filing of a Form D no later than 15 calendar days in advance of the first use of general solicitation in a Rule 506(c) offering; and (2) the filing of a closing Form D amendment within 30 calendar days after the termination of a Rule 506 offering;
- amend Form D to require additional information primarily in regard to offerings conducted in reliance on Rule 506; and
- amend Rule 507 of Regulation D to disqualify an issuer from relying on Rule 506 for one year for future offerings if the issuer, or any predecessor or affiliate [28] of the issuer, did not comply, within the last five years, with all of the Form D filing requirements in a Rule 506 offering.

In addition, in light of the ability of issuers to publicly advertise Rule 506(c) offerings, we are concerned that prospective investors may not be sufficiently informed as to whether they are qualified to participate in these offerings, the type of offerings being conducted and certain potential risks associated with such offerings. To address these concerns, we are proposing new Rule 509 of Regulation D, which would require issuers to include prescribed legends in any written communication that constitutes a general solicitation in any offering conducted in reliance on Rule 506(c) (''written general solicitation materials''). Private funds would also be required to include a legend disclosing that the securities being offered are not subject to the protections of the Investment Company Act of 1940 (''Investment Company Act'') and additional disclosures in written general solicitation materials that include performance data so that potential investors are aware that there are limitations on the usefulness of such data and provide context to understand the data presented.[29] We are proposing to disqualify an issuer from relying on Rule 506 for future offerings if such

[19] *See, e.g.,* letters from Investor Advisory Committee; NASAA; AARP; Consumer Federation.

[20] *See, e.g.,* letters from Office of the Secretary of the Commonwealth of Massachusetts Securities Division (''Massachusetts Securities Division'') (July 2, 2012); NASAA; Securities Division, Nevada Secretary of State (''Nevada Securities Division''); Ohio Division of Securities; Securities Commissioner, State of South Carolina (''South Carolina Securities Commissioner''); State Corporation Commission, Division of Securities and Retail Franchising, Commonwealth of Virginia (''Virginia Division of Securities'').

[21] *See, e.g.,* letters from AARP; AFL–CIO and Americans for Financial Reform (''AFR''); Consumer Federation; Massachusetts Securities Division (July 2, 2012); NASAA.

[22] *See* Release No. 33–6389. For natural persons, Rule 501(a) defines an accredited investor as a person whose individual net worth, or joint net worth with that person's spouse, exceeds $1 million, excluding the value of the person's primary residence (the ''net worth test'') or who had an individual income in excess of $200,000 in each of the two most recent years, or joint income with that person's spouse in excess of $300,000 in each of those years, and has a reasonable expectation of reaching the same income level in the current year (the ''income test'').

Although the Dodd-Frank Act did not change the amount of the $1 million net worth test, it did change how that amount is to be calculated—by excluding the value of a person's primary residence. This change took effect upon the enactment of the Dodd-Frank Act, and in December 2011, we amended Rule 501 to incorporate this change into the definition of accredited investor. *See Net Worth Standard for Accredited Investors,* Release No. 33–9287 (Dec. 21, 2011) [76 FR 81793 (Dec. 29, 2011)].

[23] *See, e.g.,* letters from AARP; Consumer Federation; Investment Company Institute (''ICI''); Investor Advisory Committee; Massachusetts Securities Division (July 2, 2012); Ohio Division of Securities (July 3, 2012). Several commenters noted that under the Commission's proposal in 2007 to partially lift the prohibition on general solicitation for offerings sold only to ''large accredited investors,'' such investors who were natural persons would have been required to have at least $400,000 in annual income or $2.5 million in investments. *See* letters from AFL–CIO and AFR; Fund Democracy; AARP. One commenter, however, opposed increasing the thresholds for accredited investor status. *See* letter from National Small Business Association (June 12, 2012).

[24] *See, e.g.,* letters from ICI; AFL–CIO and AFR; Consumer Federation; Investor Advisory Committee; Independent Directors Council (''IDC''); NASAA; Sens. Reed, Levin, Durbin, Harkin, Lautenberg, Franken and Akaka.

[25] *See* letters from AFL–CIO and AFR; BetterInvesting (recommending that ''the SEC require all public solicitation materials under Rule 506 to be independently reviewed for compliance (perhaps by an independent authority such as FINRA, which already reviews broker-dealer advertising) before or after the public solicitation'' (emphasis omitted)); ICI.

[26] *See* letters from Investor Advisory Committee; Consumer Federation.

[27] *See* letters from Massachusetts Securities Division (July 2, 2012); Ohio Division of Securities (July 3, 2012).

[28] An ''affiliate'' is defined in Rule 501(b) of Regulation D [17 CFR 230.501(b)] as a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

[29] A private fund is an issuer that would be an investment company, as defined in Section 3 of the Investment Company Act, but for the exclusion from the definition of ''investment company'' in Section 3(c)(1) or Section 3(c)(7) of that Act. We also refer in this release to ''pooled investment funds'' because that term is used in Form D. Issuers that rely on Section 3(c)(1) or 3(c)(7) of the Investment Company Act are a subset of pooled investment funds.

issuer, or any predecessor or affiliate of the issuer, has been subject to any order, judgment or court decree enjoining such person for failure to comply with proposed Rule 509.

We are also proposing to amend Rule 156 under the Securities Act,[30] which interprets the antifraud provisions of the federal securities laws in connection with sales literature used by investment companies, to apply to the sales literature of private funds because we believe it is important for private funds to consider the Commission's views on the applicability of the antifraud provisions to their sales literature. We are also soliciting comment on a recommendation made by commenters on the Rule 506(c) Proposing Release to mandate additional manner and content restrictions on written general solicitation materials used by private funds.

As the Commission will need to be aware of developments in the Rule 506 market after the effectiveness of Rule 506(c), we are proposing Rule 510T to require issuers, on a temporary basis, to submit any written general solicitation materials used in their Rule 506(c) offerings to the Commission no later than the date of the first use of these materials. Such materials would be required to be submitted through an intake page on the Commission's Web site. We are not proposing, at this time, that these materials would be available to the public; therefore, issuers would not file their written general solicitation materials through the Commission's EDGAR system. We are proposing to disqualify an issuer from relying on Rule 506 for future offerings if such issuer, or any predecessor or affiliate of the issuer, has been subject to any order, judgment or court decree enjoining such person for failure to comply with proposed Rule 510T.

We also appreciate the need to undertake a broader effort to review and analyze the market impact and developing market practices resulting from permitting general solicitation in connection with offerings relying on new Rule 506(c). Accordingly, we will evaluate the use of Rule 506(c) by issuers and market participants, and, in particular, the steps they take to verify that the purchasers of the offered securities are accredited investors. We have directed the Commission staff to execute a comprehensive work plan upon the effectiveness of Rule 506(c) to review and analyze the use of Rule 506(c) (the ''Rule 506(c) Work Plan''), which will involve a coordinated effort of staff from the Division of Corporation Finance, the Division of Economic and Risk Analysis (''DERA''), the Division of Investment Management, the Division of Trading and Markets, the Office of Compliance Inspections and Examinations (''OCIE'') and the Division of Enforcement. The Commission staff will, among other things:

- Evaluate the range of purchaser verification practices used by issuers and other participants in these offerings, including whether these verification practices are excluding or identifying non-accredited investors;
- evaluate whether the absence of the prohibition against general solicitation has been accompanied by an increase in sales to non-accredited investors;
- assess whether the availability of Rule 506(c) has facilitated new capital formation or has shifted capital formation from registered offerings and unregistered non-Rule 506(c) offerings to Rule 506(c) offerings;
- examine the information submitted or available to the Commission on Rule 506(c) offerings, including the information in Form D filings and the form and content of written general solicitation materials submitted to the Commission;
- monitor the market for Rule 506(c) offerings for increased incidence of fraud and develop risk characteristics regarding the types of issuers and market participants that conduct or participate in Rule 506(c) offerings and the types of investors targeted in these offerings to assist with this effort;
- incorporate an evaluation of the practices in Rule 506(c) offerings in the staff's examinations of registered broker-dealers and registered investment advisers;[31] and
- coordinate with state securities regulators on sharing information about Rule 506(c) offerings.

Implementation of the Rule 506(c) Work Plan will assist the Commission in evaluating the development of market practices in Rule 506(c) offerings. The amendments we propose today would, if adopted, support the Rule 506(c) Work Plan by enhancing the timeliness, quality and completeness of information on the issuers, investors and financial intermediaries that participate in the Rule 506 market and by requiring the submission of written general solicitation materials to the Commission. The proposed amendments would also assist the Commission's efforts to protect investors and to evaluate the development of market practices in Rule 506(c) offerings and would support future Commission consideration of any additional changes related to Rule 506(c), consistent with the Commission's mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

In addition, many commenters stated, and we agree, that the definition of accredited investor as it relates to natural persons should be reviewed and, if necessary or appropriate, amended. The Commission staff has begun a review of the definition of accredited investor as it relates to natural persons, including the need for any changes to this definition following the effectiveness of Rule 506(c). We further discuss the definition of accredited investor, and request comment on the definition, in Section V of this release.

II. Proposed Amendments Relating to Form D

A. Background

Form D is the notice of an offering of securities conducted without registration under the Securities Act in reliance on Rule 504, 505 or 506 of Regulation D.[32] Under Rule 503 of Regulation D, an issuer offering or selling securities in reliance on Rule 504, 505 or 506 of Regulation D must file a notice of sales on Form D with the Commission for each new offering of securities no later than 15 calendar days after the first sale of securities in the offering.[33] Form D is currently organized around 16 numbered items or categories of information. The information required to be provided in a Form D filing includes basic identifying information, such as the name of the issuer of the securities and the issuer's year and place of

[30] 17 CFR 230.156.

[31] OCIE currently examines multiple types of market participants that have involvement in private offerings, including registered broker-dealers that advise issuers on private placements and registered investment advisers that advise clients investing in private placements or advise private funds that offer fund interests pursuant to private offerings.

[32] Regulation D contains separate exemptions for limited offerings in Rules 504, 505 and 506. Rule 504 [17 CFR 230.504] exempts the offer and sale of up to $1 million of securities in a 12-month period by issuers that are not subject to reporting requirements under the Securities Exchange Act of 1934 (the ''Exchange Act''). Rule 505 [17 CFR 230.505] exempts offerings by issuers of up to $5 million of securities in a 12-month period. Form D also applies to offerings of securities without registration in reliance on the exemption contained in Section 4(a)(5) of the Securities Act [15 U.S.C. 77d(a)(5)].

[33] This 15-day time frame has remained unchanged since the adoption of Regulation D in 1982. In 2008, we revised Rule 503 to provide that when a Form D filing otherwise would be due on a weekend or holiday it will be deemed due on the next business day. *Electronic Filing and Revision of Form D,* Release No. 33–8891 (Feb. 6, 2008) [73 FR 10592 (Feb. 27, 2008)].

incorporation or organization; information about related persons (executive officers, directors and promoters); the exemption or exemptions being claimed for the offering; and factual information about the offering, such as the duration of the offering, the type of securities offered and the total offering amount. Although the requirement to file a Form D pursuant to Rule 503 was a condition of Rules 504, 505 and 506 when all of these rules were originally adopted,[34] it is currently not a condition of those rules. Instead, under Rule 507 of Regulation D, an issuer will be disqualified from using Regulation D if it, or a predecessor or affiliate, is enjoined by a court for failure to comply with Rule 503.[35] The Commission can waive any such disqualification upon a showing of good cause.[36]

At the time the Commission adopted Regulation D and Form D in 1982, the Form D filing requirements in Rule 503 were intended to serve an important data collection function, including, among other things, for the Commission's rulemaking efforts.[37] Until 2008, however, issuers made Form D filings in paper format, making the extraction of information for large-scale statistical analysis problematic.[38] In 2008, we adopted rule and form amendments that mandated the electronic filing of Form D on the Commission's Electronic Data Gathering, Analysis and Retrieval (EDGAR) system in a structured format.[39] As a result of these amendments, which were phased in from September 2008 to March 2009, Form D filings are now machine-readable, and the Commission, its staff, other securities regulators and the public at large now have a greater ability to analyze the Regulation D offering market through the information supplied in electronic Form D filings. In addition, the information in Form D filings has been useful for a number of other purposes, such as serving as a source of information for investors[40] and facilitating the enforcement of the federal securities laws and the enforcement efforts of state securities regulators and FINRA.[41] For example, state securities regulators typically rely on Form D as their sole notice that a Rule 506 offering is being conducted because securities issued in Rule 506 offerings are ''covered securities'' under Section 18(b)(4)(D) of the Securities Act[42] and therefore are exempt from state blue sky registration requirements.

We understand that some issuers are not making a Form D filing for Rule 506 offerings because the filing of Form D is not a condition of Rule 506. In addition, we are limited in our ability to gather information about Rule 506 offerings at the commencement of these offerings because Form D currently is not required to be filed until 15 calendar days after the first sale of securities in the offerings; and the absence of a closing filing requirement means that the Commission does not have a complete picture of Rule 506 offerings, such as the total amount of capital actually raised in these offerings. Other than the newly adopted requirement for issuers to indicate in Form D whether they are relying on Rule 506(c), Form D does not require information specific to Rule 506(c) offerings, such as information about the issuer's plans to engage in general solicitation, any practices used to satisfy the verification requirement in Rule 506(c) and the types of investors participating in Rule 506(c) offerings.

Accordingly, we are proposing a number of amendments to Regulation D and Form D. These amendments would require the advance filing of Form D for Rule 506(c) offerings, require the filing of an amendment to Form D after termination of a Rule 506 offering, expand the information requirements in Form D for offerings conducted under Rule 506 and disqualify issuers from using Rule 506 for future offerings until one year has elapsed after the required Form D filings are made if they, or their predecessors or affiliates, failed to comply, within the past five years, with the Form D filing requirements for a Rule 506 offering.

B. Timing of the Filing of Form D

We are proposing to amend Rule 503 to require issuers that intend to engage in general solicitation for a Rule 506(c) offering to file an initial Form D in advance of conducting any general solicitation activities. Currently, Rule 503 requires an issuer to file a Form D not later than 15 calendar days after the first sale of securities in a Regulation D offering. Under the proposed amendment, if an issuer has not otherwise filed a Form D for a Rule

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[34] In 1988, the Commission proposed to eliminate the requirement to file a Form D as a condition to the availability of the Regulation D exemptions, noting that ''[c]ommenters have frequently criticized'' this condition. *Regulation D,* Release No. 33–6759 (Mar. 3, 1988) [53 FR 7870 (Mar. 10, 1988)]; *Regulation D,* Release No. 33–6812 (Dec. 20, 1988) [54 FR 309 (Jan. 5, 1989)] (reproposing the elimination of Rule 503 as a condition of the Regulation D exemptions after commenters expressed concern over the effect of the proposals on enforcement efforts and potential impairment of private rights of action). In 1989, the Commission removed the filing of Form D as a condition to the Regulation D exemptions. *Regulation D,* Release No. 33–6825 (Mar. 15, 1989) [54 FR 11369 (Mar. 20, 1989)].

[35] *See* Release No. 33–6759 (''As proposed, the filing obligation under Rule 503 would continue but would no longer be a condition to the exemption. In order to provide an incentive for filing the Form D in a timely manner, the Commission is proposing new Rule 507, which would disqualify an issuer from the use of the Regulation D exemptions if it had been found to have violated Rule 503.''); Release No. 33–6825 (adopting Rule 507 as proposed).

[36] Rule 507(b) [17 CFR 230.507(b)].

[37] We stated in the proposing release for Regulation D:

> An important purpose of the notice * * * is to collect empirical data which will provide a basis for further action by the Commission either in terms of amending existing rules and regulations or proposing new ones. * * * Further, the proposed Form will allow the Commission to elicit information necessary in assessing the effectiveness of Regulation D as a capital raising device for small businesses.

Proposed Revision of Certain Exemptions from the Registration Provisions of the Securities Act of 1933 for Transactions Involving Limited Offers and Sales, Release No. 33–6339 (Aug. 7, 1981) [46 FR 41791, 41799 (Aug. 18, 1981)].

[38] In 1996, we proposed to eliminate the Form D filing requirement entirely and replace it with an issuer obligation to complete a Form D and retain it for a period of time. *Phase Two Recommendations of Task Force on Disclosure Simplification,* Release No. 33–7301 (May 31, 1996) [61 FR 30405 (June 14, 1996)]. After reviewing comments on the proposal, we decided to retain the requirement because the information collected in Form D filings was still useful to us ''in conducting economic and other analyses of the private placement market.'' *Phase Two Recommendations of Task Force on Disclosure Simplification,* Release No. 33–7431 (July 18, 1997) [62 FR 39755, 39756 (July 24, 1997)].

[39] *See* Release No. 33–8891. At that time, we substantially revised Form D to simplify and restructure the form, eliminate outdated information requirements and update and supplement other information requirements. For example, we added requirements to provide revenue range information for the issuer, or net asset value range information in the case of pooled investment funds (subject to an option in both cases to decline to disclose); more specific information on the registration exemption claimed as well as information on any exclusion claimed from the definition of ''investment company'' under the Investment Company Act; information on the date of first sale in the offering; and information on whether the offering is expected to last over a year.

[40] *Id.* (noting that the Commission's Web site ''advises potential investors in Regulation D offerings to check whether the company making the offering has filed a Form D notice and advises that '[i]f the company has not filed a Form D, this should alert you that the company might not be in compliance with the federal securities laws' '').

[41] *Id.* (stating that ''[t]he staffs of state securities regulators and [FINRA] also use Form D information to enforce securities laws and the rules of securities self-regulatory organizations'').

[42] 15 U.S.C. 77r(b)(4)(D). Although Securities Act Section 18 preempts state registration and review of offerings of ''covered securities,'' the states have investigated and brought a number of enforcement actions alleging fraud and deceit in Rule 506 offerings. *See, e.g.,* letter from NASAA (stating that, in 2011, ''state regulators took more than 200 enforcement actions related specifically to Rule 506 offerings'').

506(c) offering, it would be required, at least 15 calendar days before commencing general solicitation for the offering, to file an initial Form D that includes the information required by the following items of Form D (the ''Advance Form D''):

- Item 1. Basic identifying information on the issuer;
- Item 2. Information on the issuer's principal place of business and contact information;
- Item 3. Information on related persons;
- Item 4. Information on the issuer's industry group;
- Item 6. Identification of the exemption or exemptions being claimed for the offering;
- Item 7. Indication of whether the filing is a new filing or an amendment;
- Item 9. Information on the type(s) of security to be offered; [43]
- Item 10. Indication of whether the offering is related to a business combination;
- Item 12. Information on persons receiving sales compensation; [44] and
- Item 16. Information on the use of proceeds from the offering.

After the filing of an Advance Form D, the issuer would be required to file an amendment providing the remaining information required by Form D within 15 calendar days after the date of first sale of securities in the offering, as is currently required by Rule 503.[45]

A number of commenters on the Rule 506(c) Proposing Release, including numerous state securities regulators and several investor organizations, suggested that the Commission require Form D to be filed in advance of any general solicitation in Rule 506(c) offerings.[46] Some of these commenters stated that the advance filing of Form D would enable state securities regulators and investors, after seeing an advertisement or other notice for an offering, to more easily determine whether an issuer is at least attempting to comply with Rule 506(c).[47] One commenter noted that state securities regulators routinely review Form D filings to ensure that the offerings actually qualify for an exemption under Rule 506 and to look for ''red flags'' that may indicate that an offering may be fraudulent.[48] Other commenters stated that, with the advance filing of Form D, state securities regulators would be in a better position to ensure that no bad actors are participating in a Rule 506 offering [49] and to answer questions from investors who contact them after seeing an advertised offering.[50]

On the other hand, one commenter stated that the current 15-calendar day time frame to file a Form D following a sale provides a reasonable period for an issuer to prepare and submit the form while providing appropriate notice to regulators of a new Regulation D offering.[51] This commenter also argued that an issuer may not be certain of whether it will rely on Rule 506(b) or Rule 506(c) ahead of time.[52]

We appreciate these recommendations and recognize the concerns as well. We believe that requiring issuers to file an Advance Form D would assist the Commission's efforts to evaluate the use of Rule 506(c). Although the Commission does not anticipate that its staff will review each Advance Form D filing as it is being made, the Advance Form D would be useful to the Commission and the Commission staff, as it would enhance the information available to the Commission to analyze offerings initiated under Rule 506(c), including issuers that initiated Rule 506(c) offerings but were unsuccessful in selling any securities through these offerings or chose alternative forms of raising capital. Currently, Form D is required to be filed only after the first sale of securities, which means that issuers that offered securities, but did not complete a sale, are not required to file a Form D, thereby limiting the Commission's ability to determine which issuers are facing challenges raising capital under Rule 506(c) and whether further steps by the Commission are needed to facilitate issuers' ability to raise capital under Rule 506(c). We also understand that the Advance Form D would be useful to state securities regulators and to investors in gathering timely information about Rule 506(c) offerings and the use of Rule 506(c).

We appreciate the sensitivity that some issuers may have regarding the disclosure of detailed information about a contemplated offering before the issuer has made a final decision to raise capital in a Rule 506(c) offering or before the first sale of securities has occurred. For this reason, we propose that the Advance Form D for Rule 506(c) offerings require only the information set forth above, with a requirement to file an amendment to the Form D that includes the remainder of the information required by Form D (including information regarding the terms of the offering that may not have been known at the time of the filing of the Advance Form D and therefore omitted from the Advance Form D, such as those called for by Item 9 and Item 12 of Form D) following the completion of a sale of securities in a Rule 506(c) offering on the timetable currently required under Rule 503. An issuer that wishes to provide all of the information required by Form D in the Advance Form D may do so, obviating the need to file an additional amendment unless otherwise required under Rule 503. An issuer could also file an Advance Form D without contemplating a specific offering, in order to have the flexibility to conduct an offering using general solicitation. We believe that this approach would allow the Commission to gather the information that it needs through Advance Form D filings

[43] An issuer would be required to include the information required by Item 9 only to the extent that the information is known at the time of filing the Advance Form D.

[44] An issuer would be required to include the information required by Item 12 only to the extent that the information is known at the time of filing the Advance Form D.

[45] An issuer that has already filed a Form D containing complete information with respect to a Rule 506(c) offering would not be required to file an Advance Form D. This could occur, for example, when the use of general solicitation begins after the offering is underway and the first sale of securities has occurred for which a Form D has been filed more than 15 calendar days before the commencement of general solicitation in the offering.

[46] *See, e.g.,* letters from AARP; AFL–CIO and AFR; Consumer Federation; Commissioner of Securities, State of Hawaii (''Hawaii Commissioner of Securities''); Indiana Securities Division; Massachusetts Securities Division (July 2, 2012) (noting that an advance filing requirement for Form D ''will notify federal and state regulators that these offerings are in the marketplace, and they will give potential investors an opportunity to obtain basic information about the issuer and the offering''); Commissioner of Securities, State of Missouri (''Missouri Commissioner of Securities''); Commissioner of Securities and Insurance, State of Montana (''Montana Commissioner of Securities''); NASAA (noting that without an advance filing requirement for Form D and a filing requirement that is a condition of the exemption, ''[a]n investigator who sees an advertised offering will have no simple way of knowing whether the issuer is engaged in a compliant Rule 506 offering or is merely advertising an unregistered, non-exempt public offering''); Fund Democracy, Consumer Action, Consumer Federation, AFL–CIO and AFR (May 24, 2012); Nevada Securities Division; Ohio Division of Securities; South Carolina Securities Commissioner; Virginia Division of Securities.

The Investor Advisory Committee recommended that the Commission require issuers to file either a new ''Form GS'' or a revised version of Form D as a precondition for relying on Rule 506(c). *See* letter from Investor Advisory Committee.

[47] *See, e.g.,* letters from NASAA; Missouri Commissioner of Securities; Nevada Securities Division.

[48] *See* letter from NASAA. *See also* letter from Missouri Commissioner of Securities (stating that ''filing the Form D better equips the state securities regulators to ensure compliance with Federal and state securities laws'').

[49] *See* letter from Ohio Division of Securities (July 3, 2012).

[50] *See, e.g.,* letters from Missouri Commissioner of Securities; NASAA.

[51] *See* letter from Managed Funds Association (''MFA'') (Mar. 22, 2013).

[52] *See* letter from MFA (Sept. 28, 2012).

without unnecessarily burdening issuers or requiring issuers to disclose specific information about capital-raising plans before these plans have been determined.

Request for Comment

1. We are proposing that issuers file an Advance Form D no later than 15 calendar days before the commencement of general solicitation in a Rule 506(c) offering. Is such an advance filing useful and appropriate for an effective analysis of the Rule 506(c) market? Should the 15-calendar day period be increased or decreased? Why or why not? Should the filing deadline be tied to the commencement of general solicitation or the commencement of the offering, whether or not general solicitation is used?

2. What should the consequences be for failing to timely file an Advance Form D for a Rule 506(c) offering? Should the filing of the Advance Form D be a condition to Rule 506(c) so that failure to file results in the immediate loss of Rule 506(c) as an exemption from Securities Act registration for the offering at issue?

3. We are proposing to require the filing of an Advance Form D no later than 15 calendar days before the first use of general solicitation in a Rule 506(c) offering. We recognize, however, the possibility that a communication could be inadvertently disseminated beyond the intended audience without the issuer's knowledge or authorization. What should be the consequences for the issuer under such circumstances? Should there be a different filing deadline for the Advance Form D when there is an inadvertent general solicitation? For example, under Rule 100(a)(2) of Regulation FD,[53] the information in a non-intentional selective disclosure must be publicly disclosed ''promptly'' after the issuer knows (or is reckless in not knowing) that the information selectively disclosed was both material and non-public. Should a similar filing deadline be considered for an inadvertent general solicitation?

4. Should issuers be permitted to file an Advance Form D even if no specific offering is contemplated? Why or why not? How would this impact the usefulness of the Advance Form D data? We have identified certain information that we believe should be included in the Advance Form D. Is the information proposed for the Advance Form D the appropriate information to be provided at that point of the offering? Is there other information that issuers should provide in the Advance Form D? Would it be more difficult for issuers to provide certain information in an Advance Form D? If so, which information?

5. We are proposing that an issuer have the option of either filing an Advance Form D for Rule 506(c) offerings to provide certain information required by Form D, with the complete Form D information provided in a subsequent amendment to Form D filed no later than 15 calendar days after the first sale of securities, or providing all of the required Form D information in the Advance Form D, if known at that point in the offering. Should issuers be provided this option? Or should issuers be limited to providing certain specified information in the Advance Form D and required to file a subsequent amendment, after the first sale of securities, to provide the remainder of the information required by Form D? Would allowing issuers to have the option of providing all of the information required by Form D no later than 15 calendar days before they commence general solicitation (as compared to the current requirement of no later than 15 calendar days after the first sale of securities) affect the quality or usefulness of the Form D information for purposes of the Commission's efforts to analyze the Rule 506 market? For example, what is the likelihood that issuers will be in a position to provide all of the information required by Form D no later than 15 calendar days before the commencement of general solicitation?

6. What would be the benefits of requiring the Advance Form D for Rule 506(c) offerings? What would be the costs to issuers, market participants and other parties? Would the requirement to file an Advance Form D deter issuers from conducting Rule 506(c) offerings? Would the requirement to file an Advance Form D have differing or unique effects on certain types of issuers, such as Exchange Act reporting companies, non-reporting companies, foreign companies or private funds?

7. Would potential investors or other market participants review Advance Form D filings on a real-time basis? If so, how would they use the information in the filings? How would state securities regulators use the Advance Form D filings?

8. Are there situations in which an Advance Form D filing should not be required? If so, what are these situations?

9. Should an Advance Form D filing be required before or at the commencement of all offerings under Rule 506, or all offerings under Regulation D? If not, why?

10. Are any other rule amendments necessary if the Commission were to require the advance filing of Form D for Rule 506(c) offerings, as proposed?

C. Form D Closing Amendment for Rule 506 Offerings

We are also proposing to amend Rule 503 to require the filing of a final amendment to Form D within 30 calendar days after the termination of any offering conducted in reliance on Rule 506. Regulation D does not currently contain a requirement to file a final amendment to Form D. When Regulation D was originally adopted, issuers were required to amend the Form D filing every six months during the course of an ongoing offering and were required to make a final Form D filing within 30 days of the final sale of securities in the offering.[54] In 1986, we eliminated these requirements, anticipating that removing the final Form D filing requirement would have negligible consequences for investors and would result in some savings for both issuers and the Commission.[55]

A number of commenters on the Rule 506(c) Proposing Release suggested that the Commission reinstate a closing Form D filing requirement to enhance the flow of information to the Commission, other regulators and investors, and to improve the ability of the Commission and others to track the use of Rule 506.[56] For example, one commenter stated that the ''information provided in a closing amendment will be invaluable to the Commission and states in determining the extent to which issuers are making exempt public offerings.''[57]

In order to gather more complete information about the size and characteristics of the Rule 506 offering market, we believe that it would be appropriate to propose requiring the filing of a closing amendment for offerings conducted in reliance on Rule 506. The proposed requirement would be in addition to the existing provisions of Rule 503 that require the filing of an amendment to Form D to correct a material mistake of fact or error in a previously filed Form D, to reflect a change in information provided in a

[53] 17 CFR 243.100(a)(2).

[54] *See* Release No. 33–6389.

[55] We noted at the time that ''[t]he information contained in the original notification has proved sufficient for the Commission's enforcement surveillance for compliance with the requirements of Regulation D.'' *Form D and Regulation D,* Release No. 33–6663 (Oct. 2, 1986) [51 FR 36385, 36386 (Oct. 10, 1986)].

[56] *See* letters from NASAA; Ohio Division of Securities (July 3, 2012); Massachusetts Securities Division (July 2, 2012).

[57] Letter from Ohio Division of Securities (July 3, 2012).

previously filed Form D except in certain instances, and on an annual basis for offerings that are ongoing. The filing of a separate closing amendment within 30 days after termination of the offering would not be required if all of the information that would be included in such an amendment has already been provided in a Form D filing and the issuer has checked the box for a closing filing in such filing.

As noted above, the Commission today has a greater ability to analyze the Regulation D offering market due to electronically-filed Forms D. In recent years, the Regulation D market has also grown considerably in size and significance.[58] These factors suggest that collecting information upon the termination of Rule 506 offerings would provide greater benefits than it did in 1986, when this requirement was eliminated.

We propose to require the filing of a closing amendment to Form D for offerings under both Rule 506(b) and Rule 506(c). This is, in part, to enable more complete analysis and comparison of the use of long-standing Rule 506(b) and new Rule 506(c). In addition, because the overwhelming majority of Regulation D offerings are conducted in reliance on Rule 506, and these offerings account for substantially all of the capital reported as being raised under Regulation D, this approach should provide the Commission with substantially complete information about the Regulation D market without imposing additional compliance burdens on smaller offerings conducted in reliance on Rule 504 or Rule 505.[59]

A closing Form D amendment, in conjunction with changes to Form D to require additional information on Rule 506 offerings, as discussed below, would provide the Commission with more complete information about Rule 506 offerings. For example, under current rules, information about the amount of capital raised in a Regulation D offering is limited to the ''total amount sold'' as of the date of the last Form D filing. Any amounts sold between the date of the last Form D filing and the date the offering is terminated are not currently required to be reported on Form D. As a result, the actual amount of capital raised at the time the offering is terminated cannot be conclusively determined.[60]

Under our proposal, the closing amendment would be due no later than 30 calendar days after termination of the offering;[61] in contrast, Rule 503 formerly required a closing amendment to be made no later than 30 days ''after the last sale of securities'' in the offering.[62] Our proposed change addresses the potential concern that issuers may not know, at the time a sale is made, that such sale will be the last sale of securities in the offering. As proposed, the closing amendment must be filed when the issuer terminates the offering, whether after the final sale of securities in the offering or upon the issuer's determination to abandon the offering. Until the closing amendment is filed, the offering is deemed to be ongoing and the issuer would be subject to the current Rule 503 requirements to file amendments to Form D at least annually and otherwise as needed to reflect changes in previously filed information and to correct material mistakes and errors.[63]

Request for Comment

11. Should we require a closing Form D amendment for Rule 506 offerings, as proposed? Why or why not? Should the closing amendment requirement apply to all Regulation D offerings, as was the case when Regulation D was originally adopted? Alternatively, should the closing amendment requirement apply only to offerings under new Rule 506(c)? Are there situations where a closing amendment to Form D should not be required? If so, what are these situations? For example, should no closing amendment be required if no sales of securities have been made?

12. As proposed, a closing Form D amendment would be required to be filed not later than 30 calendar days after the termination of a Rule 506 offering. Should we use a different time frame for the filing of the closing Form D amendment? If so, why and how long?

13. We have not proposed that the filing of a closing amendment be a condition of Rule 506. If the closing amendment were a condition of Rule 506 and an issuer failed to make the required filing, the issuer would lose the exemption for the entire offering at issue, including sales that were made while the issuer was in compliance with Rule 503. Should the filing of a closing Form D amendment be a condition to Rule 506(b) or Rule 506(c)?

14. As proposed, the closing amendment must be filed within 30 calendar days after the issuer terminates the offering. Should we provide a more detailed explanation of what constitutes the termination of an offering?

15. What would be the costs to issuers of filing a closing Form D amendment? Would a requirement to file a closing Form D amendment deter issuers from conducting Rule 506 offerings? Are there any costs or benefits that we have not discussed? If so, please specify.

16. What are the alternatives to requiring a closing amendment to Form D? For example, rather than requiring a closing amendment to Form D for all Rule 506 offerings, should the Commission only require an amendment when an issuer sells an amount of securities in excess of a certain percentage (for example, 10%) above the amount reported as sold in the last Form D or Form D amendment previously filed for the offering?

17. Rule 503(a)(3)(ii) currently requires issuers to file an amendment to a previously filed Form D to reflect changes in the information provided, subject to certain enumerated exceptions. Should the proposed closing amendment to Form D serve as a substitute for this type of Form D amendment? If the proposed closing amendment requirement is adopted, should Rule 503(a)(3)(ii) be eliminated or simplified, so that only certain changes (*e.g.,* the size of the offering) would trigger the obligation to amend Form D?

18. Alternatively, in light of the proposal to impose disqualification from reliance on Rule 506 for failures to comply with Rule 503, as discussed in Section II.E below, should the Commission further amend Rule 503(a)(3)(ii), or provide additional guidance, in regard to the circumstances in which an amendment to Form D is or is not required? For example, should the Commission amend Rule 503 to set forth additional situations in which an amendment to Form D would not be required to reflect a change in the information provided in a previously filed Form D? Conversely, should the Commission amend Rule 503 to require the filing of an amendment to Form D to reflect a change in information where such amendment is not currently required under Rule 503?

19. As discussed in Section II.D below, we are proposing amendments to Form D to require additional information, primarily with respect to Rule 506 offerings. After an issuer files

[58] *See* Vladimir Ivanov and Scott Bauguess, *Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009–2012* (July 2013), *available at http://www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf* (''Ivanov/Bauguess Study'').

[59] *See id.* (in 2012, approximately 95% of Regulation D offerings claimed reliance on Rule 506; these offerings accounted for approximately 99% of capital reported as being raised under Regulation D for the year).

[60] For example, in 2010, issuers sought to raise $1.2 trillion in reported Regulation D offerings, but only $905 billion was reported as sold at the time of the initial filing. *See id.*

[61] *See* Proposed Rule 503(a)(4)(v).

[62] *See* Release No. 33–6389.

[63] 17 CFR 230.503(a)(3).

a Form D that includes this additional information, any change to this information (for example, a change in the number of purchasers who qualified as accredited investors or the methods used to verify accredited investor), would generally require the filing of an amendment to Form D under current Rule 503. Should the Commission amend Rule 503 so that an amendment to Form D would not be required when there is a change to some or any of this information? If so, which information and why?

20. Should issuers conducting ongoing offerings pursuant to Rule 506(c) be required to amend their Form D filings more frequently than on an annual basis to provide, to the extent that such information has not already been provided in a previous Form D filing, updated information regarding the dollar amount of any securities sold during such period pursuant to such offering, and any other securities of the same class (or any securities convertible into or exercisable or exchangeable for securities of the same class) sold during such period pursuant to an exemption from the registration requirements of the Securities Act? If yes, how frequently? For example, on a semi-annual basis or a quarterly basis?

21. Rule 503 requires an amendment to a previously filed Form D to correct a material mistake of fact or error ''as soon as practicable after discovery of the mistake or error'' and an amendment to a Form D to reflect a change in the information previously provided, except in certain situations, ''as soon as practicable after the change.'' Would such non-specific filing deadlines make it difficult for market participants to determine whether an issuer is disqualified from reliance on Rule 506 for failure to comply with Form D filing obligations, including the determination of when a cure period expires? Should the Commission consider amending Rule 503 to set forth more specific time frames for filing these amendments to Form D?

22. Should the Commission amend Rule 503 so that an annual amendment for an ongoing offering is required to be filed on a specified date, such as the one-year anniversary of the initial filing of a Form D or Advance Form D?

23. Should the Commission provide additional guidance on what constitutes a ''material mistake of fact or error'' that would necessitate the filing of a Form D amendment?

24. Rule 503(a)(4) currently requires an issuer that files an amendment to a previously filed Form D to provide current information in response to all requirements of the form regardless of why the amendment is filed. Should the Commission amend this requirement in Rule 503? If so, how? What are the costs and benefits associated with this requirement?

25. Should the presentation of information in a closing Form D amendment be different than in an initial Form D filing or in other Form D amendments? If so, how?

26. If an issuer filed an Advance Form D but subsequently terminated the offering without selling any securities, what information should the issuer be required to provide regarding the offering in its closing amendment?

27. Are any other rule amendments necessary if the Commission were to require the filing of a closing amendment, as proposed? If so, please specify.

D. Proposed Amendments to the Content Requirements of Form D

We are proposing revisions to Form D to add information requirements primarily for Rule 506 offerings, which would enable the Commission to gather additional information on the use of Rule 506 and thereby assist the Commission in evaluating the impact of Rule 506(c) on the existing Rule 506 market.[64] We believe that such additional information may also be useful to state securities regulators and to investors. In the Rule 506(c) Adopting Release, we adopted a revision to Form D to add a separate field or check box in Item 6 of Form D for issuers to indicate whether they are relying on Rule 506(b) or Rule 506(c).[65] We believe that requiring issuers to indicate in Form D that they are relying on Rule 506(c) will provide important information to assist in our efforts to evaluate the use of general solicitation in Rule 506(c) offerings and the size of this offering market as well as provide notice to state regulators and investors about issuers seeking to rely on Rule 506(c). The proposed revisions to Form D set forth below would require additional information on Rule 506 offerings, including information specific to Rule 506(c) offerings, such as the types of general solicitation used and the methods used to verify the accredited investor status of purchasers, which we also believe will be useful.

A number of commenters on the Rule 506(c) Proposing Release recommended that the Commission further expand the information requirements of Form D in regard to offerings under Rule 506(c).[66] Some commenters stated that they supported amending Form D to require more information about the issuer's plans to engage in general solicitation and how the issuer plans to verify that purchasers are accredited investors.[67] The Investor Advisory Committee recommended that the Commission adopt either a new form or a revised version of Form D that would elicit information on, among other things, the control persons of the issuer, counsel representing the issuer (if any), the issuer's accountants or auditors (if any), the amount sought to be raised, a brief description of the issuer's general solicitation plans and a brief description of the issuer's proposed business and use of proceeds.[68] Another commenter proposed a list of expanded information requirements for Form D, including disclosure of the issuer's Web site; if the issuer is selling interests in a pooled investment fund, disclosure of any adviser to the fund and whether the adviser is registered as an investment adviser or is otherwise exempt; a warning that finder's fees may trigger state and federal salesperson and broker-dealer registration requirements; and certification that the offering is not disqualified under the proposed bad actor rules.[69] One commenter stated that Form D should be revised to indicate whether an offering will be conducted by means of an Internet platform, and if so, the identity of the Internet platform.[70] A number of commenters stated that the Commission should consider requiring additional information in Form D about the issuers

[64] In April 2010, we proposed numerous changes to our rules related to offerings of asset-backed securities. *See Asset-Backed Securities,* Release No. 33–9117 (Apr. 7, 2010) [75 FR 23328 (May 3, 2010)]. That proposal included proposed revisions to Form D for offerings of structured finance products. Those proposed changes are still outstanding and are not being addressed in this release.

[65] We also revised Item 6 of Form D by renaming the check box for ''Rule 506,'' which will be renamed ''Rule 506(b),'' and the check box for ''Section 4(5),'' which will be renamed ''Section 4(a)(5)'' to update the reference to former Section 4(5) of the Securities Act.

[66] *See, e.g.,* letters from AARP; AFL–CIO and AFR; Consumer Federation; Investor Advisory Committee; NASAA (referring to the recommendations in its July 3, 2012 letter); Massachusetts Securities Division (referring to the recommendations in its July 2, 2012 letter).

[67] *See* letters from AARP; AFL–CIO and AFR (stating that ''the Commission should . . . expand Form D to require additional information regarding both planned general solicitation and advertising activities and plans for verification of accredited investor status''); Consumer Federation (stating that ''[i]f the Commission wishes to monitor [accredited investor verification] practices, and we believe it must, it can best achieve that by requesting information on Form D regarding the issuer's verification plans.'').

[68] *See* letter from Investor Advisory Committee.

[69] *See* letter from NASAA (referring to suggested revisions to Form D in its July 3, 2012 letter).

[70] *See* letter from Massachusetts Securities Division (July 2, 2012).

that propose to engage in general solicitation activities under Rule 506.[71]

In contrast, one commenter urged the Commission not to require additional disclosures in Form D on the issuer's proposed business and use of proceeds. This commenter asserted that Form D currently requires appropriate information on the identity of the issuer and a factual description of the offerings.[72]

We believe that amending Form D to require additional information on Rule 506 offerings would enable the Commission to better analyze the impact on the existing Rule 506 market of eliminating the prohibition against general solicitation in Rule 506(c) offerings. This information would enhance the ability of the Commission to evaluate the use of Rule 506(c) by requiring information in Form D on the types of investors that participate in Rule 506(c) offerings, the issuer's plans to engage in general solicitation and methods used to satisfy the verification requirement in Rule 506(c). This information may also be useful to investors seeking to learn more about an offering being conducted pursuant to Rule 506(c) or about the types of issuers conducting these offerings. Finally, this information may be useful in facilitating enforcement efforts should any fraud or other securities law violations occur in these offerings. As discussed below, we propose to revise existing Item 2, Item 3, Item 4, Item 5, Item 7, Item 9, Item 14 and Item 16 of Form D and to add new Items 17 through 22 to Form D.

Item 2, which requires the issuer to provide principal place of business and telephone contact information, would be amended to require the identification of the issuer's publicly accessible (Internet) Web site address, if any. We are proposing this change because issuers are increasingly using their public Web sites as vehicles for the dissemination of information to investors, while many investors are turning to company Web sites as sources of information to aid in their investment decisions.[73] We believe that the identification of the issuer's public Web site address in Form D would be useful in gathering additional information on the issuers that conduct offerings under Regulation D. This proposed amendment would apply to offerings under Rule 504, Rule 505, Rule 506 and Section 4(a)(5).

Item 3, which requires information about ''related persons'' (executive officers, directors, and persons performing similar functions for the issuer, as well as persons who have functioned as a promoter of the issuer within the prior five years), would be amended to require, when the issuer is conducting a Rule 506(c) offering, the name and address of any person who directly or indirectly controls the issuer in addition to the information currently required for ''related persons.'' We believe that more comprehensive information about persons who exercise control over the issuer would be helpful in obtaining a more complete picture of the issuers and other market participants that are involved in Rule 506(c) offerings.

In 2008, we deleted the requirement in Item 3 to identify as ''related persons'' owners of 10% or more of a class of the issuer's equity securities. In proposing this change to Item 3, we stated, among other things, that ''we believe we can collect sufficient information to satisfy the regulatory objectives of Form D by requiring only the identification of executive officers, directors, and promoters.''[74] We also noted that ''issuers that are not reporting companies have raised privacy concerns with respect to the requirement to identify 10% equity owners who are not executive officers, directors, or promoters because they do not already have to disclose this information, and the widespread availability of the information on our Web site may raise additional privacy concerns for these companies as they seek to raise capital through a private offering.''[75] While we continue to recognize these privacy concerns for issuers that conduct offerings under Rules 504, 505 and 506(b), we believe that this additional information on controlling persons who are not ''related persons'' could assist us in developing a more comprehensive understanding of the market participants in the Rule 506(c) market.

Item 4, which requires the issuer to identify its industry group from a specified list, would be amended to require the issuer to fill in a ''clarification'' field if the issuer checks the ''Other'' box. Though Item 4 currently includes a number of different industry group classifications, we believe that requiring the issuer to further describe its industry group when it is not included in the pre-established list will enhance our understanding of the types of issuers that are seeking to rely on Regulation D, while imposing a minimal burden on the issuer. This information will assist us in having more complete information regarding the range of industries of the companies using Rule 506. Without this additional requirement, conclusions drawn regarding industry trends would exclude all those issuers who checked ''Other.'' This proposed amendment would apply to offerings under Rules 504, Rule 505, Rule 506 and Section 4(a)(5).

Item 5, which requires information on issuer size, would be amended to replace the ''Decline to Disclose'' option with a ''Not Available to Public'' option. We are proposing this change because we believe that an operating company that includes information about its revenues, or a hedge fund or other investment fund that includes information about its net asset value, in general solicitation materials for a Rule 506(c) offering, or that otherwise makes such information publicly available, should be required to provide revenue range or net asset value range information, as applicable, in Form D. If, however, the issuer does not include this information in general solicitation materials for a Rule 506(c) offering, does not otherwise make the information publicly available and otherwise uses reasonable efforts to maintain the confidentiality of such information, we believe that the issuer should have the option of not providing such information by choosing a ''Not Available to Public'' checkbox. This proposed amendment would also apply to Rule 504 and Rule 505 offerings, as well as offerings under Section 4(a)(5). Requiring issuers to include this information, to the extent they otherwise publicly disclose it, would be useful to the Commission's staff in evaluating the type or size of issuers using these exemptions.

Item 7, which requires the issuer to state whether a Form D is an initial filing or an amendment to a previously filed Form D, would be amended to add separate fields or check boxes for issuers

[71] *See, e.g.,* letters from Consumer Federation (stating that ''[t]he Form D filing requirement could provide greater benefit to investors as well if its content was expanded to include basic information about the issuer''); Fund Democracy, Consumer Action, Consumer Federation, AFL–CIO and AFR (May 24, 2012) (stating that ''[t]he Commission should also consider requiring disclosure of additional information in Form D about issuers that propose to engage in [general solicitation] activities'').

[72] *See* letter from MFA (Mar. 22, 2013). This commenter also recommended that investment advisers be permitted to comply with any information requirement on Form D by either providing a reference to a publicly available Form ADV applicable to a private fund or to any publicly available information filed with a state regulator, depending on whether the investment adviser is registered with the Commission or with a state.

[73] *See, e.g., Commission Guidance on the Use of Company Web sites,* Release No. 34–58288 (Aug. 1, 2008) [73 FR 45862 (Aug. 7, 2008)].

[74] Release No. 33–8891.

[75] *Id.*

to indicate whether they are filing an Advance Form D or a closing Form D amendment. We are proposing this change in connection with our proposals to require the filing of an Advance Form D for Rule 506(c) offerings and the filing of a final amendment to Form D after the termination of any offering conducted in reliance on Rule 506. The addition of these check boxes would require issuers to identify clearly in a Form D whether the Form D is an Advance Form D or a closing Form D amendment and could provide information about the beginning and ending of offerings that could be useful in analyzing the market.

Item 9, which requires information on the types of securities offered, would be amended to require information, to the extent applicable, on the trading symbol and a generally available security identifier (''security identifier'') for the offered securities.[76] In general, this amendment would be relevant only to issuers that have securities of the same class as the offered securities traded on a national securities exchange, alternative trading system (''ATS'') or any other organized trading venue. We are proposing this change because we believe that requiring these types of issuers to provide the trading symbol and security identifier for the securities being offered, if any, would provide useful information on the nature of the securities being offered in Rule 506 offerings, as well as assist us in additional data gathering with respect to these offerings, without placing an undue burden on issuers.[77] This proposed amendment would also apply to offerings under Rule 504, Rule 505 and Section 4(a)(5).

Item 14, which elicits information on whether securities have been or may be sold to non-accredited investors and the number of investors who have already invested in the offering, would be amended to add a table requiring, with respect to Rule 506 offerings, information on the number of accredited investors and non-accredited investors that have purchased in the offering, whether they are natural persons or legal entities and the amount raised from each category of investors. We believe that this additional information would be useful in determining, among other things, the composition of investors who invest in Rule 506 offerings, the respective amounts they have invested, and the types of offerings and issuers in which each category of investors invests.

Item 16, which requires information on the amount of the gross proceeds of the offering that the issuer used or proposes to use for payments to related persons, would be amended to require information on the percentage of the offering proceeds from a Rule 506 offering that was or will be used: (1) To repurchase or retire the issuer's existing securities; (2) to pay offering expenses; (3) to acquire assets, otherwise than in the ordinary course of business; (4) to finance acquisitions of other businesses; (5) for working capital; and (6) to discharge indebtedness. This additional information requirement would apply only to Rule 506 offerings by issuers that are not pooled investment funds. This information would enable the Commission and investors to better understand why issuers are seeking to raise capital using Rule 506.

The proposed new items of Form D—Items 17 through 22—would require issuers to provide the following additional information with respect to offerings conducted pursuant to Rule 506:

- The number and types of accredited investors that purchased securities in the offering (*e.g.,* natural persons who qualified as accredited investors on the basis of income or net worth);
- if a class of the issuer's securities is traded on a national securities exchange, ATS or any other organized trading venue, and/or is registered under the Exchange Act, the name of the exchange, ATS or trading venue and/or the Exchange Act file number and whether the securities being offered under Rule 506 are of the same class or are convertible into or exercisable or exchangeable for such class;
- if the issuer used a registered broker-dealer in connection with the offering, whether any general solicitation materials were filed with FINRA;
- in the case of a pooled investment fund advised by investment advisers registered with, or reporting as exempt reporting advisers[78] to, the Commission, the name and SEC file number for each investment adviser who functions directly or indirectly as a promoter[79] of the issuer;
- for Rule 506(c) offerings, the types of general solicitation used or to be used (*e.g.,* mass mailings, emails, public Web sites, social media, print media and broadcast media);[80] and
- for Rule 506(c) offerings, the methods used or to be used to verify accredited investor status (*e.g.,* principles-based method using publicly available information, documentation provided by the purchaser or a third party, reliance on verification by a third party, or other sources of information; one of the methods in the non-exclusive list of verification methods in Rule 506(c)(2)(ii); or another method).

Some of this additional information would be specific to Rule 506(c) offerings and would enable the Commission to develop a greater understanding of the new Rule 506(c) market. Other additional information requirements would apply to all Rule 506 offerings. As stated above, the adoption of Rule 506(c) has increased the need for information on Rule 506 offerings in general, in order to assess not only the nature and characteristics of the new Rule 506(c) market but also the changing nature of the Rule 506 market as a whole. We believe that requiring this additional information for all Rule 506 offerings would be useful to the Commission, investors and state regulators.

Although the proposed revisions to Form D primarily require additional information with respect to Rule 506

[76] We recognize that the CUSIP number is in common use domestically for this purpose, but anticipate that other suitable identifiers may become available in the future.

[77] We note that, in 2007, we requested comment on whether it would be appropriate to require information on CUSIP numbers and trading symbols in Form D and that we did not require this information in Form D in connection with the Form D amendments we adopted in 2008. *See Electronic Filing and Simplification of Form D,* Release No. 33–8814 (June 29, 2007) [72 FR 37376 (July 9, 2007)] and Release No. 33–8891. In light of the adoption of Rule 506(c), we are proposing to require this information in Form D at this time because we believe that this information would enable us to engage in expanded analysis of the Form D data for Rule 506 offerings.

[78] An exempt reporting adviser is an investment adviser that qualifies for the exemption from registration under Section 203(l) of the Investment Advisers Act of 1940 (the ''Advisers Act'') [15 U.S.C. 80b–3(l)] because it is an adviser solely to one or more venture capital funds, or under Rule 203(m)–1 under the Advisers Act [17 CFR 275.203(m)–1] because it is an adviser solely to private funds and has assets under management in the United States of less than $150 million. *See* Glossary of Terms to Form ADV.

[79] The definition of promoter in Rule 405 [17 CFR 230.405] includes any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer or any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more of any class of securities of the issuer or 10 percent or more of the proceeds from the sale of any class of such securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise.

[80] We expect that the categories of social media, print media and broadcast media would be limited to efforts by the issuer, or an agent of the issuer, to directly communicate to potential investors, such as paid advertisements.

offerings, we note that the proposed revisions to Item 2, Item 4, Item 5 and Item 9 would require additional information on offerings under Rule 504, Rule 505 and Securities Act Section 4(a)(5). For the same reasons stated above, we believe that if an issuer has made information on its size publicly available, or does not take reasonable efforts to maintain such information as confidential, the issuer should be required to provide this information under Item 5 of Form D for offerings under the other Regulation D exemptions or under Section 4(a)(5). Similarly, we believe that the proposed additional information in Item 2, Item 4 and Item 9 would provide useful information on the nature of the issuers and the offered securities in regard to offerings under Rule 504, Rule 505 or Section 4(a)(5), while any additional burden on issuers in providing this information would be minimal.

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28. Should we require issuers to provide additional information in Form D filings as we have proposed? Should this additional information be required only for Rule 506(c) offerings? If so, why and what should that information be? For example, should the Commission require issuers to provide information in Form D about counsel representing the issuer (if any) or the issuer's accountants or auditors (if any), as some have suggested? If the additional information were required only for Rule 506(c) offerings, what impact would this requirement have on the use of Rule 506(c) as compared to the use of Rule 506(b)? Are there particular items of information that do not provide sufficiently useful information or would be especially burdensome for issuers to provide? Should some of the additional information that we propose to require in Form D not be required for offerings under Rule 506(b)? If so, which requirements and why? Would the additional information that we propose to request in Form D provide useful information to state securities regulators in responding to inquiries from constituents about offerings conducted under Rule 506 and in enforcement efforts?

29. What are the costs or burdens on issuers in providing the additional information in Form D, as proposed? Are there ways to reduce any costs or burdens on issuers? Would the requirement to provide this additional information result in issuers choosing not to rely on Rule 506 to raise capital?

30. Should some of the additional information that we propose to require in Form D be required only in the closing amendment to Form D?

31. Should the Commission define what it means for an issuer to make information publicly available for purposes of Item 5, or to take reasonable efforts to maintain such information as confidential? For instance, would confidential information about an issuer that is publicly disseminated by a third party in violation of a duty to keep such information confidential be deemed to be publicly available?

32. Should the Commission amend Item 5 to require an issuer that conducts a Rule 506(c) offering to provide information on its revenue range or aggregate net asset value range, as applicable, regardless of whether the issuer has otherwise made this information publicly available (for example, by including this information in general solicitation materials)?

33. Should the Commission amend Form D to include a check box for issuers to indicate whether they are filing an Advance Form D or a closing amendment to Form D, as proposed? Should there be other changes to Form D to indicate that an issuer is filing an Advance Form D or a closing amendment?

34. Should the Commission amend Form D to provide a checkbox to indicate that the issuer is required to provide disclosure of prior ''bad actor'' events under Rule 506(b)(2)(iii)?

35. Should pooled investment funds be required to provide additional or different information in connection with Rule 506(c) offerings? Should the Commission require a pooled investment fund to disclose its investment adviser's CRD [81] number rather than (or in addition to) its adviser's SEC registration number? Item 3 of Form D asks for the identity of the issuer's promoter. Should information on a pooled investment fund's investment adviser be added to Item 3, rather than the proposed Item 20? Does the proposed amendment to Item 3, requiring disclosure of any controlling persons, raise any particular concerns for pooled investment funds?

36. Should the Commission require issuers to provide more or less specific information in Form D about the methods of general solicitation used in Rule 506(c) offerings? Do certain methods of general solicitation raise particular concerns from an investor protection standpoint? For example, are some methods of general solicitation more likely to result in an increased risk of fraud or manipulation or more likely to reach non-accredited investors? Should we require additional information in Form D with respect to these methods of general solicitation? If so, what information should we require issuers to provide regarding these solicitation methods?

37. Should the Commission require issuers to provide more or less specific information on Form D about the methods used to verify accredited investor status? If so, what information should the Commission require issuers to provide regarding verification practices? For example, should we require issuers to identify any registered broker-dealers, registered investment advisers, attorneys, certified public accountants or other third parties that assisted the issuer with the verification process?

E. Proposed Amendment to Rule 507

We are proposing an amendment to Rule 507 of Regulation D that is intended to improve Form D filing compliance in connection with Rule 506 offerings. Rule 507 currently only disqualifies an issuer from using Regulation D if the issuer, or a predecessor or affiliate, has been enjoined by a court for violating the filing requirements in Rule 503. We propose to amend Rule 507 so that, in addition to the existing disqualification from Rules 504, 505 and 506 of Regulation D that arises from a court injunction, an issuer would be disqualified automatically from using Rule 506 in any new offering for one year if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the past five years, with Form D filing requirements in a Rule 506 offering; provided that such one-year period would commence following the filing of all required Form D filings or, if the offering has been terminated, following the filing of a closing amendment.

When Regulation D was originally adopted in 1982, compliance with Form D filing obligations was a condition of Rules 504, 505 and 506. In 1989, the Commission amended Regulation D to eliminate the filing of Form D as a condition to those rules.[82] The Commission did so with the expectation that the concurrent adoption of Rule 507 would provide an incentive for issuers

[81] A Central Registration Depository (''CRD'') number is a system identification number assigned to each investment adviser that registers or files reports with the SEC or a state through the Investment Adviser Registration Depository Web site. The Web site facilitates registration of investment advisers and reporting by exempt reporting advisers. CRD numbers also are assigned to broker-dealers.

[82] *See* Release No. 33–6825.

to file Form D.[83] In fact, the disqualification provision of Rule 507 has rarely been invoked since its adoption,[84] and we understand that some issuers are not filing a Form D for Rule 506 offerings.[85]

A number of commenters on the Rule 506(c) Proposing Release, including the Investor Advisory Committee, urged us to require the filing of Form D as a condition to Rule 506(c), so that the failure to file a Form D would result in the loss of the exemption for the offering.[86] One commenter stated that it generally supported conditioning the availability of Regulation D on the filing of Form D, provided that an issuer that filed a Form D in good faith but with inadvertent technical errors would have an adequate opportunity to cure its mistake while relying on Regulation D.[87]

Other commenters argued against conditioning Rule 506(c) on the filing of a Form D.[88] One commenter stated that such a condition would have potential negative effects on the private placement market.[89] Another commenter argued that if Rule 506(c) were conditioned on the filing of a Form D, the consequences of losing the exemption would be significantly disproportionate to the harm of failing to file the Form D, including the loss of ''covered security'' status under Section 18 of the Securities Act.[90] One commenter maintained that conditioning the availability of the exemption on the filing of a Form D would be inappropriate in light of the purpose of Form D to enable the Commission to better understand and analyze how Regulation D is being used.[91]

We believe it is appropriate to strengthen the incentives for issuers to comply with Rule 503, which would make it more likely that the Commission will obtain Form D data that provides a more complete perspective on Rule 506(c) offerings and the Rule 506 marketplace as a whole, thereby facilitating efforts by both the Commission and state securities regulators to analyze developments in that marketplace. Further, we believe that an effective incentive for issuers to comply with the Form D filing requirement is one that results in meaningful consequences for failing to file the form, without requiring action on the part of the Commission or the courts. We are nonetheless mindful that the incentive should be commensurate to the obligation so that the failure to comply does not give rise to disproportionate consequences.

Although we considered requiring compliance with Rule 503 as a condition of Rule 506, or at least Rule 506(c), we have determined not to propose making Form D filing a condition of Rule 506. We are reluctant to impose a sanction on an issuer as severe as the loss of a Securities Act exemption, which would give purchasers rescission rights and result in loss of ''blue sky'' pre-emption,[92] for failure to file a form that is intended primarily to provide information to the Commission. If compliance with Rule 503 were reinstated as a condition to Rule 506, then non-compliance at any stage of an offering could result in the entire offering being held to violate Section 5 of the Securities Act and applicable state securities laws. For example, in the case of a continuous or long-lived offering, this could mean that an issuer's failure to file an annual amendment or closing amendment would trigger loss of the Securities Act exemption, which would give purchasers rescission rights and result in loss of blue sky pre-emption for offers and sales that occurred, in certain cases, years before the failure to file a Form D triggered the loss of an exemption. We believe that the consequences of a Section 5 violation would be disproportionate in those circumstances. More generally, we are concerned about possible disruptions in the Rule 506 market if market participants could not be certain of the availability of Rule 506 for an offering until after the offering was terminated and all filings required under Rule 503 were made. We are, however, soliciting comment on whether Rule 506 should be conditioned on Form D filing compliance.

Instead of making the Form D filing a condition to Rule 506, we propose to amend Rule 507 by adding new paragraph (b), under which issuers would be disqualified from using Rule 506 for future offerings if they, or their predecessors or affiliates, had failed to comply within the past five years with the Form D filing requirements of Rule 503 in connection with an offering under Rule 506.[93] Under proposed Rule 507(b), disqualification would end one year after the required Form D filings are made or, if the offering has been terminated, one year after a closing amendment is made.[94] We believe that a one-year disqualification period, which would not commence until the required filings are made, should create a significant incentive to file Form D on a timely basis without unduly burdening market participants.

The proposed disqualification would not affect offerings of an issuer or an affiliate that are ongoing at the time of the filing non-compliance, including the offering for which the issuer failed to make a required filing, and these offerings could continue to rely on Rule

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83 *See id.*

84 In order to invoke the Rule 507 disqualification provision, the Commission must first bring a civil injunctive action in a federal district court and receive a court order enjoining the defendant from future violations of Rule 503. The Commission has brought few such enforcement actions. *See SEC v. Printz Capital Management,* No. 10–7379 (E.D. Pa. Mar. 15, 2011) (order enjoining defendants from, among other things, failing to file a Form D for a Regulation D offering).

85 Many commenters have asserted that non-compliance with Form D filing obligations is widespread. *See, e.g.,* letters from Investor Advisory Committee (stating that ''[i]t is generally acknowledged that a significant number of issuers do not currently file Form D . . .''); AARP (stating that ''[s]imply adding a checkbox to a form that too often goes unfiled and then only after the fact is inadequate to the task at hand.''); AFL–CIO and AFR (stating that ''many issuers today flout the Form D filing requirement for such offerings, further limiting the Commission's ability to provide effective oversight''). *See also* Securities and Exchange Commission, Office of Inspector General, *Regulation D Exemption Process* (Mar. 31, 2009) (''OIG Report''), *available at http://www.sec-oig.gov/Reports/AuditsInspections/2009/459.pdf* (stating that while the Commission staff ''strongly encourage companies to comply with Rule 503, they are aware of instances in which issuers have failed to comply with Rule 503 . . .''). Based on its analysis of the filings required by FINRA Rules 5122 and 5123 during the period of December 3, 2012 to February 5, 2013, DERA estimates that as much as 9% of the offerings represented in the FINRA filings for Regulation D or other private offerings that used a registered broker-dealer did not have a corresponding Form D filing. *See* Section IX.B.4.a of this release.

86 *See* letters from Investor Advisory Committee (stating that ''[t]he filing of Form D should be made a condition for relying on the Regulation D exemption.''); Massachusetts Securities Division (referring to the recommendations in its July 2, 2012 letter); NASAA; Consumer Federation; AARP.

87 *See* letter from MFA (Mar. 22, 2013).

88 *See* letters from Committee on Securities Regulation of the New York City Bar Association; Federal Regulation of Securities Committee, Business Law Section of the American Bar Association (''ABA Fed. Reg. Comm.''); Securities Regulation Committee, Business Law Section of the New York State Bar Association (''SRC of NYSBA''); Linklaters LLP.

89 *See* letter from Linklaters LLP.

90 *See* letter from SRC of NYSBA.

91 *See* letter from ABA Fed. Reg. Comm.

92 Section 18 of the Securities Act exempts ''covered securities'' from state review and registration requirements. Under Section 18(b)(4)(D), ''covered securities'' is defined to include securities offered or sold in transactions pursuant to Commission rules issued under Section 4(a)(2). Thus, if an offering fails to comply with Rule 506, the securities offered and sold in the offering would not be ''covered securities,'' and the issuer would violate state law unless it had complied with applicable review and registration requirements or could avail itself of a state law exemption.

93 Existing Rule 507(b) would be redesignated as Rule 507(c).

94 *See* Proposed Rule 507(b).

506 as long as the conditions of Rule 506 continue to be met. Disqualification would apply only to future offerings. We further propose that disqualification from using Rule 506 for future offerings would be subject to a cure period and the waiver provisions in Rule 507, as discussed below. As with the proposed closing amendment requirement and for the same reasons, we propose to apply new Rule 507(b) to all offerings under Rule 506.

Under the proposal, disqualification would arise only with respect to non-compliance with Rule 503 that occurred after the effectiveness of new Rule 507(b). We considered whether to apply the disqualification for failure to comply with the filing requirement before the effective date of the rule. We are not proposing such a requirement. We are proposing to include a five-year look-back period, so that non-compliance that occurred more than five years before the commencement of a Rule 506 offering would not trigger disqualification, even if the required Form D filings had not been made. We believe that this limitation would avoid potential burdens on market participants that might otherwise be created, such as the possibility of indefinite disqualification in situations where it is not possible for the required Form D filings for a previous offering to be made, without undermining the incentive for issuers in Rule 506 offerings to comply with their Form D filing obligations. A look-back period would also reduce the cost of confirming whether an issuer is disqualified from reliance on Rule 506, and could reduce the number of delinquent filings required to be made before the one-year disqualification period starts to run. The look-back period would not extend past the effective date of the rule, so issuers seeking to conduct a Rule 506 offering would assess compliance with Rule 503 by looking back only to the effective date of the disqualification rule.

Disqualification would arise based on non-compliance with Rule 503 by the issuer and its predecessors and affiliates, as provided in current Rule 507. We believe that proposed Rule 507(b) should be structured in this manner so that an issuer cannot avoid disqualification by simply conducting future offerings through a successor or other affiliated entity. We are soliciting comment on whether this approach is appropriate for all issuers.

Because this approach creates potentially significant consequences for an issuer's future capital-raising activities based on its failure to file or amend the form for a current or prior offering, we anticipate that proposed Rule 507(b), if adopted, could significantly reduce non-compliance with Form D filing requirements for Rule 506 offerings. We further believe that disqualification from using Rule 506 for a one-year period after all required Form D filings have been made is a sufficient period of time to incentivize compliance with Rule 503 while at the same time not serving as a disproportionate penalty for the failure to file or amend Form D.

When we amended Regulation D to remove Rule 503 compliance as a condition to Rules 504, 505 and 506, we noted that the Form D filing condition was subject to frequent criticism.[95] As discussed above, however, the usefulness of Form D filings has increased significantly since we required them to be filed in electronic form on EDGAR. In addition, the proposed amendment differs from the prior Rule 503 condition in that the amendment would impose disqualification only prospectively and would not apply to any offerings that are ongoing at the time of filing non-compliance. Disqualification would also be limited to one year after all Form D filing requirements have been satisfied, and the look-back period for Rule 506 offerings that were not in compliance with Rule 503 would be limited to five years and would not extend to non-compliance that occurred prior to the effective date of proposed Rule 507(b).

The proposed amendment also includes mitigating provisions that were not applicable when compliance with Rule 503 was a condition to Regulation D. As discussed below, under the proposal, there would be a cure period for late filings, as well as recourse to the waiver provision of Rule 507, under which disqualification may be waived by the Commission for good cause shown. We believe that these provisions should help address concerns regarding the disproportionality and consequences of inadvertent failures to file or amend Form D.

Cure period. We propose that, solely for purposes of determining whether disqualification under Rule 507 would arise, issuers would generally be regarded as having complied with the Rule 503 filing deadlines for a Form D or Form D amendment if they filed the relevant filing within a cure period after the filing is due under Rule 503.

A number of commenters expressed concern about the possibility that an issuer could be unfairly penalized for inadvertent technical errors relating to its Form D filing and recommended that the Commission provide an opportunity for the issuer to correct such errors.[96] We recognize this concern and therefore propose a cure period of 30 calendar days, which would be available in the case of an issuer's failure to file a Form D or Form D amendment on a timely basis. This provision is intended to allow an additional period of time in which issuers could detect a failure to file or amend Form D (for example, due to clerical error or technological problem) and make the requisite filing. We believe that 30 calendar days is a sufficient period of time for issuers to address an inadvertent error and that a longer period may have the effect of encouraging a greater degree of non-compliance with the deadlines for Form D filings. By including a cure period of 30 calendar days, we would provide issuers with certainty that the benefits of Rule 506 would remain available so long as a failure to file Form D was corrected during the specified time frame.

The proposed cure period would be available only for an issuer's first failure to file timely a Form D or Form D amendment in connection with a particular offering. We believe that permitting issuers to repeatedly rely on the 30-day cure period for Form D filings for the same offering would undermine incentives to comply with the filing deadlines specified in Rule 503.

Waiver. Rule 507 currently provides that disqualification under the rule may be waived by the Commission if the Commission determines ''upon a showing of good cause, that it is not necessary under the circumstances that exemption be denied.''[97] This formulation is substantially the same as the waiver provision included in new Rule 506(d), the bad actor disqualification provisions for Rule 506 adopted today.[98] We believe that the

[95] *See* Release No. 33–6759.

[96] *See, e.g.,* letters from MFA (Mar. 22, 2013) (stating that ''[w]e generally support the filing of Form D being made a condition to relying on Regulation D, provided that an issuer that filed the Form in good faith but with inadvertent technical errors in the Form would have sufficient opportunity to cure its mistake while maintaining its reliance on Regulation D. * * * Upon notice of such an error, a fund manager or issuer should be provided a reasonable period of time to file a corrected Form D.''); Investor Advisory Committee (stating that ''[i]n implementing this recommendation [to condition a Regulation D exemption on the filing of Form D], which is intended to encourage broad compliance with the filing requirement, the Committee encourages the Commission also to consider incorporating measures to ensure that it does not impose undue penalties for inadvertent violations by small, unsophisticated issuers.'').

[97] Rule 507(b).

[98] *See* Rule 506(d)(2)(ii).

Commission should have the ability to waive disqualification in situations where an issuer or its predecessors or affiliates have failed to comply with Rule 503, provided that the issuer can demonstrate good cause that it is not necessary to deny the exemption. For example, a waiver may be appropriate if an issuer can show that the persons who controlled the issuer at the time of the failure to file no longer exercise influence over it, or if curing the failure is impossible (for example, because a defaulting affiliate no longer exists and therefore cannot make the missing Form D filings or amendments) and good cause can otherwise be shown that it is not necessary in the circumstances to deny the exemption.

Under current rules, the Commission has delegated authority to the Director of the Division of Corporation Finance to grant disqualification waivers under Rule 507.[99] We anticipate that, if the proposal were adopted, we would similarly delegate authority for waivers of disqualification under new Rule 507(b).

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38. Is disqualifying issuers and their affiliates and successors from reliance on Rule 506 for future offerings an appropriate sanction to incentivize compliance with Form D filing requirements? Why or why not? How would these amendments affect the Rule 506 market?

39. Proposed Rule 507(b) would not impose any consequences with respect to the offering for which an issuer failed to file or amend a Form D as required, or for other offerings that were ongoing at the time of the failure to file. Would disqualification from reliance on Rule 506 for future offerings be a sufficient incentive for issuers to comply with Form D filing requirements? Why or why not? Should an issuer engaged in an ongoing offering be permitted to continue relying on Rule 506 if it or an affiliate failed to comply with the filing requirements of Rule 503?

40. Should the result be the same for failure to comply with all parts of Rule 503? For example, should the result be the same when the issuer does not file an amendment to a Form D as it would when the issuer does not make an Advance Form D filing or an initial Form D filing? Should there be a distinction between annual amendments to Form D and amendments required to correct a material mistake of fact or error or to reflect a change in information?

41. As proposed, outside of the cure period, disqualification under Rule 507(b) would not be lifted until one year after all required Form D filings are made or, in the case of offerings that had been terminated, a closing amendment is made. Is this an appropriate requirement? If not, what are the alternatives?

42. What would be an appropriate disqualification period as an alternative to the proposal, such that issuers would be sufficiently incentivized to comply with Form D filing obligations without unduly burdening capital formation under Regulation D? Is the proposed one-year disqualification period appropriate, or should the disqualification period be shorter or longer? Why?

43. Under the proposal, disqualification would not be triggered by any failure to comply with Rule 503 that occurred more than five years before the offering. Is it appropriate to include a look-back period in this way? Why or why not? If so, is the five-year period proposed appropriate, or should it be shorter or longer? If so, why?

44. The look-back period would not extend to the period prior to the effective date of proposed Rule 507(b). Is it appropriate not to consider these filings before the effective date of the rule? Why or why not?

45. Are there particular situations where disqualification under Rule 507(b) should not be triggered for failure to file a required Form D or Form D amendment?

46. As proposed, issuers would be disqualified from using Rule 506 based on noncompliance with Rule 503 within the past five years in connection with a Rule 506 offering by their predecessors and affiliates. Is it appropriate to disqualify issuers for non-compliance by their predecessors and affiliates? If not, would it be too easy to avoid disqualification by using an affiliate or successor entity to conduct a Rule 506 offering? How should the Commission address this concern?

47. Would portfolio companies that are affiliates of a private fund be unduly affected by any disqualification triggered by noncompliance of the private fund, its predecessors and its affiliates with Rule 503? If so, should the Commission treat portfolio companies of private funds differently for disqualification purposes? If yes, how?

48. Is it appropriate to prohibit a private fund or its successors or affiliates from engaging in a subsequent offering under Rule 506 if the private fund failed to comply with Rule 503? For instance, if a private fund issuer fails to file its Form D or the appropriate amendments in accordance with the filing requirements of Rule 503, is it a disproportionate response to prohibit any private funds affiliated with the private fund from relying on Rule 506? Should proposed Rule 507(b) contain an express provision that excludes affiliated private funds from such consequences?

49. Is it appropriate to include a cure period for noncompliance with Rule 503? Would the benefits of including a cure period justify the potential detriments, such as undercutting issuers' incentive to comply with the existing Rule 503 filing deadlines? If a cure period is included, should it apply to all required Form D filings, or only some? For example, should there be a cure period for the closing amendment only? Or for amendments, but not the initial filing? Should the Advance Form D have a cure period? Instead of providing a cure period, should we move back the deadlines for Form D filings? Are there other alternatives to a cure period or further provisions that the Commission should consider?

50. The cure period is not available if the issuer has previously failed to comply with a Form D filing deadline in connection with the same offering. Is this condition appropriate? Why or why not? Should the cure period be available if the issuer has failed to timely file a Form D or Form D amendment more than once in connection with the same offering? If so, how many times in a single offering or otherwise how frequently should an issuer be able to invoke the cure period? Should the cure period become available again after a certain amount of time, such as five years, has elapsed since the issuer previously failed to comply with a Form D filing deadline?[100] Should we impose additional requirements or conditions on an issuer's ability to take advantage of the cure period? For example, should the cure period be unavailable if the failure to file Form D was intentional? Would additional guidance be necessary to explain what constitutes intentional or repeated failures to file? Should the issuer have to indicate that the filing is late and state the reason for its being late? Should there be more specific requirements to rely on the cure, such as the issuer suffered an intervening event (for example, a clerical or technological problem)? Alternatively,

[99] *See* Rule 30–1(c) of the Commission's Rules of Organization and Program Management [17 CFR 200.30–1(c)].

[100] For example, should an issuer, such as a private fund, that is conducting a continuous offering be permitted to have a cure period if five or more years have elapsed since the initial failure to timely file a Form D?

should the cure period be automatically available to all issuers without other conditions or qualifications? Are there other events that should make the cure period unavailable to an issuer?

51. Should a cure period be available for repeated or intentional failures to comply with Rule 503? If yes, should there be a look-back period for determining whether failures to comply with Rule 503 are repeated?

52. If a cure period is included, is the 30-day period we propose appropriate? Should the cure period be shorter or longer? Should it be the same for all types of filings, or should the Commission vary the cure period for different filings? For example, should there be a shorter or longer cure period provided for the Advance Form D filing, the closing amendment or other amendments, compared to other Form D filings?

53. As an alternative or in addition to a cure period, should we amend Rule 507 so that disqualification can be triggered by a Commission cease-and-desist order as well as court injunction? Should we add a provision similar to existing Rule 508,[101] under which insignificant deviations from the requirements of Rule 503 would not result in disqualification under proposed Rule 507(b) if the issuer could demonstrate good faith and a reasonable attempt to comply with filing requirements?

54. Should we amend Rule 507 to disqualify an issuer from relying on Rule 506 for future offerings if such issuer, or any predecessor or affiliate of the issuer, has been subject to a Commission order requiring such person to cease-and-desist from committing or causing any violation or future violation of proposed Rule 509 or proposed Rule 510T, both of which are discussed below?

55. Should the Commission amend Form D to provide a checkbox to indicate that the issuer is relying on the proposed cure period?

56. Is it appropriate to amend Rule 507's existing waiver provision so it applies to proposed Rule 507(b)? Should we provide guidance regarding factors that the Commission may take into account when considering whether to grant a waiver?

57. Are there other methods for improving compliance with Rule 503 that the Commission should consider? For example, should there be other consequences for non-compliance with Form D filing requirements? Would the combination of proposed Rule 507(b) and increased enforcement of existing Rule 503, which could result in monetary penalties or imposition of disqualification under existing Rule 507, provide a sufficient incentive to comply with these requirements?

58. As an alternative to proposed Rule 507(b), should the availability of Rule 506 be conditioned on compliance with Rule 503, as was the case when Regulation D was originally adopted? If so, should compliance with Rule 503 be a condition to both Rule 506(b) and Rule 506(c), as well as to Rules 504 and 505? Alternatively, should compliance with Rule 503 be a condition to reliance on new Rule 506(c) only? Should the availability of Rule 506 be conditioned on compliance with all of the filing requirements of Rule 503 or should it be conditioned on compliance with only some of the filing requirements of Rule 503 (and if so which filing requirements)? If compliance with Rule 503 is a condition to Rule 506, should there be a mechanism for issuers to request a waiver from Form D filing requirements? If so, how should that mechanism work? Are any other rule amendments necessary if the Commission were to require compliance with Form D filing requirements as a condition to reliance on Rule 506? If so, what amendments?

III. Proposed Rule and Rule Amendments Relating to General Solicitation Materials

We are proposing new requirements and amendments to address investor protection concerns arising from the ability of issuers, including private funds, to generally solicit for their Rule 506(c) offerings. First, we propose to add new Rule 509 to require all issuers to include: (i) Legends in any written general solicitation materials used in a Rule 506(c) offering; and (ii) additional disclosures for private funds if such materials include performance data. Second, we propose amendments to Rule 156 under the Securities Act that would extend the guidance contained in the rule to the sales literature of private funds. Each of these proposals is discussed in greater detail below. Finally, we request comment on manner and content restrictions for general solicitation materials of private funds, a subject on which we received a number of comments and suggestions.

A. Mandated Legends and Other Disclosures for Written General Solicitation Materials

In light of issuers' ability to generally solicit their Rule 506(c) offerings, we are proposing requirements for issuers to better inform potential investors as to whether they are qualified to participate in these offerings, the type of offerings being conducted and certain potential risks associated with such offerings. A number of commenters on the Rule 506(c) Proposing Release recommended that the Commission adopt content restrictions or other requirements with respect to general solicitation materials used by issuers, such as private funds, in Rule 506(c) offerings.[102] For example, the Investor Advisory Committee recommended that the Commission ''take steps to ensure that any performance claims in materials used as part of general solicitations are based on appropriate performance reporting standards.'' [103] Some commenters also recommended that the Commission require the inclusion of legends, warning labels or mandatory risk disclosures in general solicitation materials used in these offerings.[104]

While we believe that further consideration following experience with offerings under new Rule 506(c) is needed with respect to potential content restrictions for issuers' general solicitation materials, we are proposing new Rule 509, which would require all issuers to include the following prominent legends in all written general solicitation materials:

- The securities may be sold only to accredited investors, which for natural persons, are investors who meet certain minimum annual income or net worth thresholds; [105]

[101] 17 CFR 230.508. Under Rule 508, the failure to comply with a term, condition or requirement of Rule 504, Rule 505 or Rule 506 will not result in the loss of the exemption from the registration requirements of Section 5 for any offer or sale of securities to a particular individual or entity, if the person relying on the exemption shows the failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity; the failure to comply was insignificant with respect to the offering as a whole; and a good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of Rule 504, Rule 505 or Rule 506. *Id.*

[102] *See, e.g.,* letters from AFL–CIO and AFR; Investor Advisory Committee; Sen. Levin; CFA Institute; Consumer Federation; Hawaii Commissioner of Securities; ICI; IDC; L. Neumann; Montana Commissioner of Securities; NASAA; Nevada Securities Division; Ohio Division of Securities; P. Turney; Sens. Reed, Levin, Durbin, Harkin, Lautenberg, Franken and Akaka; South Carolina Securities Commissioner; Virginia Division of Securities.

[103] Letter from Investor Advisory Committee.

[104] *See* letters from P. Rutledge (recommending a legend stating that all sales in the offering will be to accredited investors); CFA Institute (recommending a prominent ''surgeon's general''-type warning label and mandated disclosures that address the potential risks of Rule 506(c) offerings); BetterInvesting (recommending mandatory risk disclosure language that would appear at the beginning of all general solicitation materials).

[105] This part of the legend may be modified in accordance with any higher standards that may be applicable to the issuer, such as qualified clients (as

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• The securities are being offered in reliance on an exemption from the registration requirements of the Securities Act and are not required to comply with specific disclosure requirements that apply to registration under the Securities Act;

• The Commission has not passed upon the merits of or given its approval to the securities, the terms of the offering, or the accuracy or completeness of any offering materials;

• The securities are subject to legal restrictions on transfer and resale and investors should not assume they will be able to resell their securities; and

• Investing in securities involves risk, and investors should be able to bear the loss of their investment.

We believe that such legends would better inform potential investors as to whether they are qualified to participate in Rule 506(c) offerings and certain potential risks that may be associated with such offerings. Written general solicitation materials may combine two or more of these required statements in a single sentence, provided that each of the required disclosures is clear and easy to understand. Similarly, written general solicitation materials may use any wording that clearly communicates the information required to be disclosed. Compliance with the proposed legend requirements, however, does not relieve an issuer from the requirement to take reasonable steps to verify that purchasers in a Rule 506(c) offering are accredited investors.

We also recognize the specific concerns that commenters have expressed regarding private funds' ability to advertise to the general public, especially in light of the fact that private funds raise a significant amount of capital in Rule 506 offerings.[106] Under Rule 506(c), private funds, such as hedge funds, venture capital funds and private equity funds, will be permitted to engage in general solicitation in compliance with the rule without losing the exclusions from the definition of ''investment company'' under Section 3(c)(1) [107] or Section 3(c)(7) [108] of the Investment Company Act.[109] Several commenters on the Rule 506(c) Proposing Release recommended that we impose additional conditions on private funds that rely on Rule 506(c). In particular, these commenters believed that general solicitation materials of private funds should be subject to some form of content requirements and/or restrictions.[110] For example, some believed that private funds engaging in general solicitation should be held to performance and advertising standards that are analogous to mutual fund standards.[111] One of these commenters suggested that the Commission develop a rule tailored to the manner in which private funds calculate and present performance, rather than extending mutual fund performance rules to private funds.[112] Some commenters made other suggestions, such as requiring each private fund relying on Rule 506(c) to disclose that the private fund is not registered with the Commission and should not be confused with a registered fund, such as a mutual fund.[113]

In response to these concerns, we are proposing that an additional legend and disclosures be required for private fund written general solicitation materials. First, we propose that private funds include a legend on any written general solicitation materials that the securities offered are not subject to the protections of the Investment Company Act.[114] We believe it is appropriate to include a legend regarding a private fund's status under the Investment Company Act because the Act provides important protections that are not applicable to private funds or their investors. For example, the Investment Company Act includes limitations on self-dealing, affiliated transactions and leverage and requirements regarding independent board members, none of which apply to private funds, and the proposed legend would serve to alert investors and the broader general public to this fact. The legend also may help address any misimpression regarding the level of statutory and regulatory protections that apply to investors in a private fund.

Second, we propose that Rule 509 require private funds to include certain disclosures in any written general solicitation materials that include performance data. These disclosures are similar to certain disclosures required by Rule 482 under the Securities Act for advertisements and other sales materials of registered investment companies.[115] Specifically, proposed Rule 509(c) would require any private fund written general solicitation materials that include performance data to include a legend disclosing that:

• Performance data represents past performance;

• past performance does not guarantee future results;

• current performance may be lower or higher than the performance data presented;

• the private fund is not required by law to follow any standard methodology

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defined by Rule 205–3 under the Advisers Act [17 CFR 275.205–3]) or qualified purchasers (as defined by Section 2(a)(51) of the Investment Company Act [15 U.S.C. 80a–2(a)(51)]).

[106] *See* Ivanov/Bauguess Study.

[107] 15 U.S.C. 80a-3(c)(1) (excluding from the definition of ''investment company'' any ''issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities'').

[108] 15 U.S.C. 80a–3(c)(7) (excluding from the definition of ''investment company'' any ''issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities''). The term ''qualified purchaser'' is defined in Section 2(a)(51) of the Investment Company Act [15 U.S.C. 80a–2(a)(51)] and the rules thereunder.

[109] *See* Rule 506(c) Adopting Release, at Section II.E (discussing the effect of Section 201(b) of the JOBS Act, which provides that ''[o]ffers and sales exempt under [amended Rule 506] shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation'').

[110] *See, e.g.,* letters from AFL–CIO and AFR; Consumer Federation; Rep. Waters (supporting the establishment of standards for reporting performance and fees by private funds); ICI (recommending the imposition of content restrictions on private fund advertising and requiring certain disclosures in private fund advertisements to avoid investor confusion with mutual funds).

[111] *See, e.g.,* letters from Fund Democracy; ICI; IDC; Sen. Levin; NASAA.

[112] *See* letter from ICI (stating that ''[w]e do not recommend that the content rule applicable to mutual fund performance advertisements . . . be extended to private funds. We strongly recommend, rather, that the Commission develop a rule tailored to the ways private funds calculate and present performance.'').

[113] *See, e.g.,* letters from Consumer Federation (stating that the Commission should require private fund advertisements to include ''a clear, prominent warning that they are not mutual funds and carry special risks.''); Fund Democracy (stating that the Commission should ''require explicit, large-font disclaimers that hedge funds are not mutual funds and present special risks.''); ICI (recommending that the Commission require disclaimers regarding the performance figures or measures displayed in any private fund advertisements).

[114] Private funds could combine the legend regarding the Investment Company Act with the legend regarding disclosure obligations under the Securities Act to simply state that the securities offered are not subject to the protections of the Investment Company Act or required to comply with specific disclosure requirements that apply to registration under the Securities Act.

[115] 17 CFR 230.482. We note that the Commission proposed amendments to Rule 482, which have not yet been adopted, as part of its recent money market fund reform proposals. The proposed amendments would require money market funds to include certain disclosure statements on advertisements and sales materials designed to inform investors about the risks of investing in money market funds and the risks of a floating net asset value, if applicable. *See Money Market Fund Reform; Amendments to Form PF,* Release No. 33–9408 (June 5, 2013) [78 FR 36834 (June 19, 2013)].

We are requesting comment on the extent to which ''liquidity funds,'' which are private funds that seek to maintain a stable net asset value (or minimize fluctuations in their net asset values) and thus can resemble money market funds, should be required to include similar disclosure statements in written general solicitation materials.

when calculating and representing performance data; and

- the performance of the fund may not be directly comparable to the performance of other private or registered funds.

The proposed rule would also require the legend to identify either a telephone number or a Web site where an investor may obtain current performance data.

We believe that many investors, both sophisticated and unsophisticated, consider performance to be a significant factor when selecting investments, including when selecting private funds.[116] As such, we believe that the proposed disclosures are a meaningful way to highlight that there are limitations on the usefulness of past performance data, as well as the inherent difficulty of comparing performance of a private fund with other private funds and with registered products, such as mutual funds.

Further, we are proposing to require that if a private fund's written general solicitation materials include performance data, then such data must be as of the most recent practicable date considering the type of private fund and the media through which the data will be conveyed, and the private fund would be required to disclose the period for which performance is presented.[117] Because investors consider performance to be one of the most significant factors when evaluating investments, we are concerned that private funds presenting non-current performance data may confuse, and even mislead, investors regarding the fund's current performance, particularly if the fund's performance has changed significantly after the period reflected in the advertisement. In addition, by proposing to require disclosure of either a telephone number or a Web site where an investor may obtain current performance data, we seek to address the concern that a potential investor may be reviewing written general solicitation materials with performance data that, although at the time it was published was as of the most recent practicable date, could now be considered non-current because more current performance data is available.[118]

We are also proposing to require private funds that include performance data that does not reflect the deduction of fees and expenses in their written general solicitation materials to disclose that fees and expenses have not been deducted and that if such fees and expenses had been deducted, performance may be lower than presented. We believe it is important for investors to be informed about whether performance information presented reflects the deduction of fees and expenses.

As proposed, the requirement to include these legends and other disclosures, as applicable, would not be a condition of the Rule 506(c) exemption. Therefore, the failure to include legends or other disclosures in any written general solicitation materials as required by Rule 509 would not render Rule 506(c) unavailable for the offering. We recognize the potentially disproportionate consequences that would result if an inadvertent error in, or omission of, the legends or disclosures results in a violation of Section 5 of the Securities Act, as well as state securities laws and the uncertainty that issuers would have regarding the availability of Rule 506(c) for their offerings.

Instead, we are proposing to amend existing Rule 507(a) so that Rule 506 would be unavailable for an issuer if such issuer, or any of its predecessors or affiliates, has been subject to any order, judgment or court decree enjoining such person for failure to comply with Rule 509. We believe that the possibility of disqualification from reliance on Rule 506 would provide issuers with sufficient incentive to comply with the requirements of Rule 509, without penalizing them unduly for an inadvertent error in, or the omission of, a legend or other required disclosure in written general solicitation materials.

We recognize the Commission's experience with Rule 507 as it relates to compliance with the Form D filing requirements of Rule 503 and our belief today that the incentives for compliance with these requirements must be strengthened.[119] We have decided, however, not to propose that non-compliance with Rule 509 would result in disqualification from reliance on Rule 506 without requiring action on the part of the Commission or the courts. We recognize this differs from our treatment of non-compliance with Rule 503 under proposed Rule 507(b); however, we are concerned that such a disqualification provision could result in disproportionate consequences for inadvertent errors or omissions, particularly in light of the large amounts of written communications that many issuers may use during the course of a Rule 506(c) offering that could be viewed as written general solicitation materials triggering proposed Rule 509. Consideration of an approach similar to proposed Rule 507(b) may be more appropriate after first assessing the level of compliance Rule 509 once it is in effect. In this regard, we believe that it is reasonable to expect a higher level of compliance with proposed Rule 509, which would require limited, standardized information about Rule 506(c) offerings, than the current level of compliance with Rule 503, which requires the public filing of a Form D that notifies the market of the occurrence of an offering and contains issuer- and offering-specific information. As a result, including the required legends and other disclosures in written general solicitation materials would seem less likely to raise any concerns for issuers. We believe that Rule 507(a), with its provision that disqualification would occur only if a court takes injunctive action, may be better suited for addressing the varied facts and circumstances that may cause an issuer not to include the required legends and other disclosures in its written general solicitation materials and for determining whether disqualification for this failure is appropriate. While we are not proposing that compliance with Rule 509 be a condition to Rule 506(c) or that non-compliance trigger disqualification without action on the part of the Commission or courts, we are soliciting comment on both of these alternative approaches.

We also are requesting comment on whether content restrictions should apply to private fund general solicitation materials, but we are not proposing to prohibit private funds from including performance information in general solicitation materials at this time. The presentation of performance information, like other information used in general solicitation and other

[116] *See Study Regarding Financial Literacy Among Investors* (Aug. 30, 2012), *available at http://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf* (Commission staff study indicating that retail investors find information regarding investment performance to be useful and relevant before purchasing an investment product); *see also Proposed Amendments to Investment Company Advertising Rules,* Release No. 33–8101 (May 17, 2002) [67 FR 36712 (May 24, 2002)].

[117] We are not proposing that private funds provide performance data for a specific period (*e.g.,* as of the most recently completed month) because we understand that the investment strategies employed by private funds vary. For instance, the most recent practicable date for which performance data is available may differ between a hedge fund with liquid assets and a private equity fund with illiquid and hard-to-value assets.

[118] Under the proposed rule, we intend current performance data to mean as of the last date on which the private fund customarily determined the valuation of its portfolio securities. We do not expect a private fund to value its portfolio for the sole purpose of providing updated current performance under proposed Rule 509.

[119] *See* Section II.E of this release.

materials, is subject to the antifraud provisions of the federal securities laws.[120] Compliance with the proposed legend and disclosure requirements does not relieve an issuer from the obligation to comply with these antifraud requirements. We note that performance data for certain private funds are available from other sources and that material deviations between reported performance and performance included on general solicitation materials could be misleading.[121] Furthermore, as we noted in the Rule 506(c) Adopting Release, we believe it is appropriate for advisers to private funds to review their compliance policies and procedures and make appropriate updates to such policies and procedures, particularly if the private funds intend to engage in general solicitation activity.[122]

Request for Comment

59. Should we require all issuers to include the proposed legends in written general solicitation materials? Why or why not? Are accredited investors already aware of the information included in the proposed legends? Would the proposed legends be effective in reducing the incidence of non-accredited investors participating in Rule 506(c) offerings?

60. Is it appropriate for the Commission to provide for disqualification from reliance on Rule 506 for non-compliance with Rule 509? How would this affect the Rule 506(c) market? Should the Commission amend Rule 507 to also include Commission cease-and-desist and administrative proceedings? Would another mechanism provide a better incentive for issuers to include legends and other disclosures in written general solicitation materials that relied on a simpler enforcement mechanism but did not impose an immediate disqualification?

61. Should the Commission condition Rule 506(c) on compliance with the proposed requirements of Rule 509? What effect would such a condition have on the Rule 506 market? If compliance with Rule 509 were a condition of Rule 506(c), should the Commission provide for a cure mechanism for inadvertent errors in, or the omission of, legends or other required disclosure in the written general solicitation materials?[123] If so, what should be the parameters of this cure mechanism?

62. Do the proposed legends and required disclosures appropriately inform potential investors as to whether they are qualified to participate in Rule 506(c) offerings, the type of offerings being conducted and the potential risks that may be associated with such offerings? If not, how could they be revised to do so? Should additional legends or disclosures be required and, if so, what should these additional legends or disclosures be?

63. Should we have specific requirements for the legends and disclosures, such as for type size, type style, location and proximity? If so, what should they be? Alternatively, should we require the legends and disclosures to be presented in any manner reasonably calculated to draw investor attention to them?

64. Should we define the types of communications that constitute written general solicitation materials for purposes of the proposed requirements of Rule 509? If so, how should we define written general solicitation materials? For example, should we refer to the definition of ''written communications'' in Rule 405 under the Securities Act?[124] Should we specify that the term includes any electronic communications?

65. Should comparable disclosure be required to be provided in oral communications used in a Rule 506(c) offering that constitute general solicitations? Why or why not? Should the legends and required disclosures be required to be included in all offering materials or just the materials used in connection with general solicitation activities? How would issuers provide such disclosure?

66. Are there alternative methods for encouraging important explanatory information regarding performance to be given sufficient prominence in written general solicitation materials? Would mandated legends be helpful in mitigating concerns regarding fraudulent statements in written general solicitation materials?

67. The proposed amendments do not specify the precise wording of any required legends. Is that appropriate? Or should we require specific wording? If so, what would that be?

68. Should we specifically require disclosure of the date as of which any performance data included in the written general solicitation materials was calculated? Should we require all such performance data to be current as

[120] *See, e.g., In the Matter of Oppenheimer Asset Management Inc. and Oppenheimer Alternative Investment Management, LLC,* Release No. IA–3566 (Mar. 11, 2013); *In the Matter of Sentinel Investment Management Corp.,* Release No. IA–3556 (Feb. 22, 2013) (settled enforcement action alleging that adviser misrepresented to investors that client's investments in private limited partnerships were growing and performing well); *In the Matter of Calhoun Asset Management, LLC, et al.,* Release No. IA–3428 (July 9, 2012) (settled enforcement action alleging that hedge fund adviser disseminated marketing materials that contained misrepresentations about performance and unsupported performance returns); *In the Matter of Belal K. Faruki,* Release No. IA–3405 (May 17, 2012) (settled enforcement action alleging hedge fund adviser made material misrepresentations to an investor regarding the fund's track record); *In the Matter of GMB Capital Management LLC, et al.,* Release No. IA–3399 (Apr. 20, 2012) (settled enforcement action alleging hedge fund adviser made misrepresentations in marketing materials, meetings with potential investors, and a Web site interview that the adviser subsequently reprinted and distributed to investors and potential investors regarding the funds' historic performance).

[121] For instance, performance information must be reported to the Commission in a non-public filing on Form PF. Question 17 of Form PF requires certain registered investment advisers managing private funds to report to the Commission the private fund's performance information as reported to current and prospective investors. While Question 17 instructs advisers to provide the most representative performance results if the fund reports different performance results to different groups of investors, we would expect an adviser to be able to explain and justify the difference between performance information included in any written communications used in a Rule 506(c) offering and that which is reported in such adviser's Form PF report, if applicable. Private funds may also voluntarily report performance data to publicly-available databases.

[122] *See* Rule 506(c) Adopting Release, at Section II.E (noting that ''[w]e believe that investment advisers that have implemented appropriate policies and procedures regarding, among other things, the nature and content of private fund sales literature, including general solicitation materials, are less likely to use materials that materially mislead investors or otherwise violate the federal securities laws.'').

[123] For example, Securities Act Rule 164 [17 CFR 230.164] permits an issuer or an offering participant to cure an unintentional or immaterial failure to include the specified legend in any free writing prospectus, as long as a good faith and reasonable effort is made to comply with the legend condition and the free writing prospectus is amended to include the specified legend as soon as practicable after discovery of the omitted or incorrect legend. In addition, if a free writing prospectus has been transmitted to potential investors without the specified legend, the free writing prospectus must be retransmitted with the appropriate legend by substantially the same means as, and directed to substantially the same investors to whom, it was originally transmitted. Securities Act Rule 163 [17 CFR 230.163] provides a similar cure provision.

[124] Rule 405 defines ''written communications'' as, except as otherwise specifically provided or the context otherwise requires, any communication that is written, printed, a radio or television broadcast, or a graphic communication. Rule 405 defines ''graphic communication'' as including all forms of electronic media, including, but not limited to, audiotapes, videotapes, facsimiles, CD–ROM, electronic mail, Internet Web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks and other forms of computer data compilation. ''Graphic communication'' does not include a communication that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted through graphic means.

of the most recent practicable date? To give issuers certainty, should we provide more specific guidance as to what constitutes the most recent practicable date? Should we require performance data to be provided for a specific period (*e.g.,* for the last one, five, and ten year periods)? Should we require such performance data to be updated at specified intervals? If so, what interval or intervals would be appropriate? Should we require a private fund to provide narrative disclosure regarding the methodology used to calculate performance data? Will such required disclosure become standardized or unwieldy and, therefore, less useful to investors?

69. If all purchasers in an offering receive a private placement memorandum that includes all of the required legends, is it necessary that other materials also include these legends?

70. To what extent do issuers, including private funds, currently use legends similar to those proposed in this release (for example, in the private placement memoranda given to the potential investors)? To what extent do they use other legends? Does this differ depending on the type of document used? For example, do private placement memoranda contain more extensive legends than other marketing materials?

71. As proposed, private funds would be required to include a telephone number or a Web site where an investor may obtain current performance data. Is this requirement appropriate? Should private funds be required to provide performance information on a Web site? Should private funds be allowed to restrict access to such Web site through the use of passwords or other measures?

72. Do the proposed disclosures relating to performance data appropriately inform investors that there are limitations on the usefulness of past performance data and the difficulty of comparing the performance of one private fund to other funds, particularly in light of the fact that private funds are not required by law to calculate or present performance pursuant to a standard methodology? If so, how? If not, why not?

73. If the amendments to Rule 482 proposed in the money market fund reform proposals are adopted,[125] should we require liquidity funds to include similar disclosure statements in written general solicitation materials? For example, should we require liquidity funds to include a statement that the fund's sponsor has no legal obligation to provide financial support to the fund, and that an investor should not expect that the sponsor will provide financial support to the fund at any time? Why or why not?

74. Rule 506(c) may cause certain types of issuers that have historically registered offerings under the Securities Act to instead conduct offerings under Rule 506(c). These issuers also may use performance data in written general solicitation materials. For example, non-traded REITs, which have historically included prior performance data in Securities Act registration statements and sales literature, may instead conduct Rule 506(c) offerings and provide similar data in written general solicitation materials. Should we adopt legends or other disclosure requirements that are tailored to additional types of issuers, such as non-traded REITs? If so, which types of issuers should be required to include legends or other required disclosure in their written general solicitation materials? What information should be required?

75. What are the costs or burdens on issuers in providing the legends and other required disclosures, as proposed? Are there ways to reduce any costs or burdens on issuers?

76. Should we adopt additional or different legends or disclosure requirements for written general solicitation materials used by private funds in Rule 506(c) offerings when performance data is included?

B. Proposed Amendments to Rule 156

We are also proposing to amend Rule 156 under the Securities Act to apply the guidance contained in the rule to the sales literature of private funds.[126] We are proposing the amendments because we believe it is important to provide guidance to private funds in developing sales literature that is neither fraudulent nor misleading, particularly in light of the Commission's adoption of Rule 506(c).[127] We are of the view that private funds should now be considering the principles underlying Rule 156 to avoid making fraudulent statements in their sales literature.

Rule 156 provides guidance on the types of information in investment company sales literature that could be misleading for purposes of the federal securities laws, including Section 17(a) of the Securities Act[128] and Section 10(b) of the Exchange Act[129] and Rule 10b–5 thereunder.[130] Under these provisions, whether a statement involving a material fact is misleading depends on an evaluation of the context in which it is made. Rule 156 outlines certain situations in which a statement could be misleading. These include certain general factors that could cause a statement to be misleading,[131] as well as circumstances where representations about past or future investment performance[132] and statements involving a material fact about the characteristics or attributes of an investment company[133] could be misleading.[134]

125 *See* Release No. 33–9408.

126 The term ''private fund'' would be defined in Rule 156 as an issuer that would be an investment company, as defined in Section 3 of the Investment Company Act (15 U.S.C. 80a–3), but for Section 3(c)(1) or 3(c)(7) of that Act. *See* proposed Rule 156(d). Rule 156(c) under the Securities Act defines ''sales literature'' to include ''any communication (whether in writing, by radio, or by television) used by any person to offer to sell or induce the sale of securities of any investment company.''

127 *See* Rule 506(c) Adopting Release.

128 15 U.S.C. 77q(a).

129 15 U.S.C. 78j(b).

130 17 CFR 240.10b–5.

131 A statement could be misleading because of other statements being made in connection with the offer of sale or sale of the securities in question; the absence of explanations, qualifications, limitations, or other statements necessary or appropriate to make such statement not misleading; or general economic or financial conditions or circumstances. *See* Rule 156(b)(1).

132 Representations about past or future investment performance about an investment company could be misleading because of statements or omissions made involving a material fact, including situations where portrayals of past income, gain, or growth of assets convey an impression of the net investment results achieved by an actual or hypothetical investment which would not be justified under the circumstances, including portrayals that omit explanations, qualifications, limitations, or other statements necessary or appropriate to make the portrayals not misleading; and representations, whether express or implied, are made about future investment performance, including: (a) representations, as to security of capital, possible future gains or income, or expenses associated with an investment; (b) representations implying that future gain or income may be inferred from or predicted based on past investment performance; or (c) portrayals of past performance, made in a manner which would imply that gains or income realized in the past would be repeated in the future. *See* Rule 156(b)(2).

133 A statement involving a material fact about the characteristics or attributes of an investment company could be misleading because of statements about possible benefits connected with or resulting from services to be provided or methods of operation which do not give equal prominence to discussion of any risks or limitations associated therewith; exaggerated or unsubstantiated claims about management skill or techniques, characteristics of the investment company or an investment in securities issued by the company, services, security of investment or funds, effects of government supervision, or other attributes; and unwarranted or incompletely explained comparisons to other investment vehicles or to indexes. *See* Rule 156(b)(3).

134 We note that the Commission proposed amendments to Rule 156, which have not yet been adopted, to address concerns that emanated from target date funds but are applicable to all investment companies. The proposed amendments would provide that a statement suggesting that securities of an investment company are an appropriate investment could be misleading in two

Continued

The Commission adopted Rule 156 as an interpretive rule to provide guidance in certain areas which, based on the Commission's regulatory experience with investment company sales literature, had proven to be particularly susceptible to misleading statements.[135] Just as the antifraud provisions of the Securities Act and the Exchange Act apply to the offer and sale of securities issued by an investment company, those same provisions apply to the offer and sale of securities issued by a private fund.[136] We note that some commenters on the Rule 506(c) Proposing Release requested that the Commission clarify whether the interpretive guidance in Rule 156 also applies to private funds.[137] Accordingly, the Commission believes it is important to provide interpretive guidance to private funds regarding the types of information in sales literature that could be fraudulent or misleading.

While the adoption of Rule 506(c) is the impetus for proposing amendments to Rule 156 to extend its guidance to private funds, the proposed amendments would apply to all private funds, including private funds engaged in general solicitation activity under Rule 506(c). This reflects our view that statements or representations have the potential to mislead investors regardless of the type of offering, investors' level of sophistication or whether such materials are used in a general solicitation.[138]

circumstances: (i) a statement could be misleading because of the emphasis it places on a single factor as the basis for determining that an investment is appropriate; or (ii) a statement suggesting that securities of an investment company are an appropriate investment could be misleading because of representations that investing in the securities is a simple investment plan or that it requires little or no monitoring by the investor. *See Investment Company Advertising: Target Date Retirement Fund Names and Marketing,* Release No. 33–9126 (June 16, 2010) [75 FR 35920 (Jun. 23, 2010)].

If the Commission were to adopt those amendments, we anticipate that such amendments would also apply to private fund sales literature because we believe the descriptions of what statements could be misleading (for example, a statement emphasizing a single factor as the basis for determining that an investment is appropriate) would apply equally to statements made in the sales literature of private funds.

[135] *See Mutual Fund Sales Literature Interpretive Rule,* Release No. 33–6140 (Oct. 26, 1979) [44 FR 64070 (Nov. 6, 1979)].

[136] In addition, statements by an investment adviser to any investor or prospective investor in a private fund that are fraudulent or materially misleading also violate Section 206 of the Advisers Act [15 U.S.C. 80b–6(4)] and Rule 206(4)–8 under the Advisers Act [17 CFR 275.206(4)–8].

[137] *See* letters from ICI and NASAA.

[138] For example, misleading statements or representations could be made in materials for an offering pursuant to Rule 506(b).

Rule 156 does not prohibit or permit any particular representations or presentations. The circumstances in which statements or representations in investment company sales materials may be viewed as misleading appear to be similar to the circumstances in which statements or representations in private fund sales materials may be viewed as misleading. Based on enforcement and regulatory experience regarding private funds, we believe that the areas identified in Rule 156 as being vulnerable to misleading statements in investment company sales literature are similarly vulnerable with respect to private fund sales literature. For example, the Commission has brought enforcement actions against private fund advisers and others for material misrepresentations to investors and prospective investors regarding past or future investment performance and characteristics or attributes of the private fund. Such actions have included instances in which defendants were charged with misrepresenting a private fund's prior investment performance,[139] exaggerating their personal employment history and qualifications,[140] omitting information regarding their disciplinary history,[141] misrepresenting information about the holdings of the fund's investment portfolio,[142] making fraudulent claims that the fund was performing better than the major stock indexes,[143] and falsely valuing the fund's investments.[144]

As the Commission previously described in connection with amendments to Rule 156, we have been particularly concerned that representations regarding past performance or future investment performance could be misleading given that many investors consider performance to be one of the most significant factors when selecting or evaluating mutual funds.[145] The Commission explained that it was concerned that past performance information that did not contain an adequate explanation of other facts may create unrealistic investor expectations or mislead potential investors.[146] The amendments were intended to address concerns about: (i) Advertising performance without providing adequate disclosure of unusual circumstances that have contributed to fund performance; (ii) advertising performance without providing adequate disclosure of the performance period or that more current information about performance is available and it may be lower than advertised performance; and (iii) advertising performance based on selective time periods without providing disclosure that would permit an investor to evaluate the significance of performance that is based on selective time periods.[147] The Commission also highlighted how some funds addressed these concerns through narrative disclosure when performance presentations were provided.[148]

[139] *See, SEC* v. *Alero Odell Mack, Jr., Steven Enrico Lopez, Sr., Easy Equity Asset Management, Inc., Easy Equity Management, L.P., Easy Equity Partners, L.P., Alero Equities the Real Estate Company, L.L.C., and Alero I.X. Corp.,* Litigation Release No. 21731 (Nov. 4, 2010) (settled action).

[140] *See id.; SEC* v. *Jean Baptiste Jean Pierre, Gabriel Toks Pearce, and Darius L. Lee,* Litigation Release No. 17303 (Jan. 10, 2002) (settled action).

[141] *See In the Matter of LeadDog Capital Markets, LLC, f/k/a LeadDog Capital Partners, Inc., Chris Messalas and Joseph Larocco, Esq.,* Administrative Proceeding File No. 3–14623, Initial Decision Release No. 468 (Sept. 14, 2012) (Finality Order, Release No. 34–68205 (Nov. 12, 2012)).

[142] *See id.; In the Matter of Michael Lauer,* Administrative Proceeding File No. 3–13265 (Jan. 29, 2009) (settled action).

[143] *See id.*

[144] *See id.*

[145] *See* Release No. 33–8101.

Request for Comment

77. Are there certain types of private funds that will find it difficult to apply the guidance in Rule 156 to their sales literature? If so, which types of private funds and why? Are there changes to the guidance in Rule 156 that would be appropriate to consider in connection with the extension of the guidance to private funds?

78. Are there additional amendments to Rule 156 that would help to clarify the obligations of private funds under the antifraud provisions?

79. If the amendments to Rule 156 proposed in the target date fund rulemaking are adopted,[149] we anticipate making such amendments also applicable to sales literature of private funds. Is there any reason such

[146] *See Amendments to Investment Company Advertising Rules,* Release No. 33–8294 (Sept. 29, 2003) [68 FR 57760 (Oct. 6, 2003)].

[147] *See* Release No. 33–8101.

[148] For example, the Commission noted that such narrative disclosures were designed to inform investors that: (i) The advertised performance was achieved through the fund's use of particular investment strategies under specified circumstances that are not likely to recur (*e.g.,* disclosing that a significant portion of the advertised performance was attributable to the allocation of an initial public offering of securities to the fund but indicated that such allocation would not likely continue in the future); (ii) the advertised performance is not the fund's current performance and that due to market volatility or other factors, the fund's performance changes over time or that the fund's current performance may be lower than the advertised performance; or (iii) the fund's performance may be volatile or that the advertised performance is not representative of the fund's historical performance. *Id.*

[149] *See* Release No. 33–9126.

guidance should not apply to sales literature of private funds?

80. Would antifraud guidance be useful regarding issues that may arise with respect to sales literature disseminated by other types of issuers in connection with offerings pursuant to Rule 506(c), such as non-traded REITs? Would similar guidance be appropriate for other types of issuers, such as statements that sales material should present a balanced discussion of risk and reward, and be consistent with representations in offering documents? What are the expected costs and benefits with respect to any such guidance?

C. Request for Comment on Manner and Content Restrictions for Private Funds

As noted above, some commenters have expressed particular concern that eliminating the prohibition against general solicitation may create more opportunities for private funds to distribute misleading and fraudulent information.[150] Commenters recommending content restrictions expressed concern that general solicitation materials for private funds raise a substantial risk of investor confusion, and may cause an investor to draw unwarranted conclusions when comparing the performance of private funds, which are not subject to standardized performance calculation and reporting requirements, to the performance of other funds.[151] Commenters also noted that, among other things, private fund portfolios tend to be more illiquid and difficult to value than registered investment companies, which may result in misleading performance data due to faulty valuations.[152] Some commenters have also suggested that, until the Commission can develop standardized performance methodologies, private funds should be prohibited from including performance data in general solicitation materials.[153] Other commenters, however, have stated that the risk of investor harm is limited because only accredited investors can purchase private funds offered under Rule 506(c).[154]

With respect to performance calculations for private funds, we note that the methodologies can vary for a number of reasons, such as the type of the fund, assumptions underlying the calculations and investor preferences. Given that legitimate reasons may result in different approaches to calculating performance for private funds, we have determined not to propose standardized calculation methodologies for performance of private funds without further study.

We believe that the antifraud provisions of the federal securities laws, and the requirement that purchasers of a private fund offered under Rule 506(c) be accredited investors, provide a level of investor protection and thus we are not proposing to prohibit or restrict the use of performance data at this time. We are soliciting specific comment on this issue as well as on whether other manner and content restrictions related to the removal of the prohibition against general solicitation are necessary or appropriate for Rule 506(c) offerings by private funds or other issuers. As stated previously, we have directed the Commission staff to review and analyze developments in the new Rule 506(c) market, including the form and content of written general solicitation materials submitted to the Commission.[155]

Request for Comment

81. Commenters have expressed concern about private funds including performance information in general solicitations materials. Should the Commission apply any content restrictions to performance advertising by private funds? Why or why not? Should the Commission apply content standards to specific types of performance advertising (*e.g.,* model or hypothetical performance)? Why or why not? Are there current practices that would be affected? If the performance information is otherwise truthful and not misleading, what should the Commission consider in deciding whether any content restriction is appropriate or necessary? Does the fact that investors in a private fund engaged in a Rule 506(c) offering must be accredited to purchase securities suggest a level of financial sophistication such that content restrictions in general, or certain content restrictions specifically, should not be required?

82. How do the different types of private funds (*e.g.,* hedge funds, private equity funds, venture capital funds, and securitized asset funds) calculate and present performance? Should private funds be subject to standardized performance reporting? If so, what reporting standard(s) should apply? Is there any standard that is widely used by private funds and should we consider requiring the use of such standard? Would one standardized performance reporting methodology be appropriate for different types of private funds?

83. Should the use of performance claims by a private fund as part of a general solicitation be conditioned on a requirement that the private fund be subject to an audit by an independent public accountant? Would such a requirement provide some level of protection that the performance claims were at least based on valuations of assets audited by an independent third party? To what extent do private funds typically have such an audit?

84. Is there a concern that, without content restrictions, materials used as part of general solicitations may vary depending upon who is selling the product (*e.g.,* a broker-dealer's material subject to FINRA rules may differ from an issuer's materials)?

85. Is investor confusion (or confusion by the general public) a concern with respect to a private fund's general solicitation materials? If so, what is the

[150] *See, e.g.,* letters from AFL–CIO and AFR; Consumer Federation; ICI; IDC.

[151] *See, e.g.,* letters from ICI (noting that comparisons may be particularly difficult when a private fund is compared to a mutual fund, which is subject to specific calculation methodologies for performance data); and IDC (stating that ''[i]nvestors viewing mutual fund advertisements and private fund advertisements may see wide variations in performance information, without any explanation or way to understand the bases for the differences'').

[152] *See, e.g.,* letters from NASAA (explaining that ''the investment strategies of private funds are typically more opaque, risky, and illiquid than those of mutual funds''); ICI (May 21, 2012) (noting that private funds often ''invest in securities that are difficult to value or relatively illiquid'' and citing a 2003 NASD sweep of broker-dealers that found several areas of concern in hedge fund advertisements and sales literature, including with respect to the presentation of performance data). Commission staff in our Office of Investor Education and Advocacy also recently issued an investor bulletin regarding hedge funds, advising investors that ''[h]edge funds do not need to follow any standard methodology when calculating performance, and they may invest in securities that are relative illiquid and difficult to value.'' *See* Office of Investor Education and Advocacy, *Investor Bulletin: Hedge Funds* (Oct. 2012), *available at http://sec.gov/investor/alerts/ib_hedgefunds.pdf.*

[153] *See, e.g.,* letters from ICI (recommending a prohibition on use of performance advertising by private funds until the Commission can develop a new rule regarding such advertising); IDC; Consumer Federation (recommending that ''the Commission should at the very least adopt clear standards for the reporting of performance and fees by private funds, and delay their eligibility from engaging in general solicitation and advertising until such time as those standards are in place.'').

[154] *See, e.g.,* letters from BlackRock (stating its belief that ''the requirement that only sophisticated institutions and individuals may ultimately purchase interests in these funds . . . eliminates the risk that investors could be harmed as a result of a manager engaging in general advertising or solicitation'') and MFA (Sept. 28, 2012) (stating that ''only sophisticated investors may purchase interests in hedge funds, including those that in the future are offered and sold in reliance on revised Rule 506''). *See also* letter from MFA (June 20, 2013) (asserting that the Dodd-Frank Act and the Commission's regulatory implementation of the Dodd-Frank Act have significantly strengthened regulatory oversight of investment advisers to hedge funds).

[155] *See* Section I of this release.

specific nature of that confusion given that ultimately only accredited investors may invest in private funds engaged in a Rule 506(c) offering?

86. Should the Commission draw a distinction between general solicitation activity engaged in by a private fund relying on Section 3(c)(1) of the Investment Company Act compared to a fund relying on Section 3(c)(7) of the Investment Company Act? [156] If so, how and why? General solicitation can be conducted through a broad array of media, including, but not limited to, print advertisements, billboards, television, the Internet and radio. Which ones will be most likely used in private fund offerings? Are there certain types of media that present heightened investor protection concerns?

IV. Proposed Temporary Rule for Mandatory Submission of Written General Solicitation Materials

We are proposing new Rule 510T of Regulation D to require that an issuer conducting an offering in reliance on Rule 506(c) submit to the Commission any written general solicitation materials prepared by or on behalf of the issuer and used in connection with the Rule 506(c) offering. Under the proposed rule, the written general solicitation materials must be submitted no later than the date of first use of such materials in the offering. We are proposing the rule as a temporary rule that would expire two years after its effective date.

In connection with the Rule 506(c) Proposing Release, a number of commenters recommended that the Commission require materials used in general solicitations under Rule 506(c) to be filed with, or furnished to, either the Commission or FINRA. Some commenters recommended that we require the submission of all proposed general solicitation materials as an exhibit to Form D.[157] Other commenters, including the Investor Advisory Committee, suggested the creation of a publicly-available online electronic ''drop box'' on the Commission's Web site into which all general solicitation materials (whether in print, audio or video forms) could be deposited, together with a cover form identifying the issuer using the general solicitation materials and the circumstances under which the materials are to be used, with the Rule 506(c) exemption conditioned on such filings being made either before first use or promptly after first use.[158] Still other commenters recommended that we consider requiring the pre-filing of all general solicitation materials under Rule 506(c) with FINRA, regardless of whether any broker-dealer involved in the offering is exempt from registration under the Exchange Act.[159] These commenters generally asserted that such a requirement is needed as a safeguard for investor protection.

The Commission will need to understand developments in the Rule 506 market after the effectiveness of Rule 506(c). One of these developments would be the market practices through which issuers would solicit potential purchasers of securities offered in reliance on Rule 506(c). We believe that it is important that the Commission have the ability to assess these market practices. Proposed Rule 510T would facilitate this assessment by requiring issuers to submit any written general solicitation materials used in their Rule 506(c) offerings no later than the date of the first use of these materials. Such materials would be required to be submitted through an intake page on the Commission's Web site. To allow the Commission to assess market developments prior to the adoption of proposed Rule 510T, the Commission will establish and make available for use the intake page upon the effectiveness of Rule 506(c). Doing so will allow issuers, investors and other market participants to submit voluntarily any written general solicitation materials used in Rule 506(c) offerings. The submitted materials would be considered by the Commission staff as part of the Rule 506(c) Work Plan.

We are not proposing, at this time, that issuers file their written general solicitation materials through the Commission's EDGAR system. Written general solicitation materials submitted to the Commission pursuant to proposed Rule 510T would not be treated as being ''filed'' or ''furnished'' for purposes of the Securities Act or Exchange Act, including the liability provisions of those Acts. As the written general solicitation materials would be submitted to the Commission for the purpose of furthering the Commission's understanding of the market practices in the Rule 506 market, we are not proposing to make the written general solicitation materials publicly available on the Commission's Web site.[160] Oral communications used to solicit potential purchasers of securities offered through Rule 506(c) offerings would not be subject to proposed Rule 510T. We believe that limiting the requirements of proposed Rule 510T in this manner is reasonable as we expect that many issuers will prefer to use written general solicitation materials due to the potentially greater reach and lower costs of such solicitation methods. Thus, we expect that requiring the submission of only written general solicitation materials should provide us with an efficient way to assess developments in the Rule 506 market.

Compliance with proposed Rule 510T would not be a condition of Rule 506(c). As with the proposed Rule 509 requirement that issuers include legends and other disclosures in written general solicitation materials, we believe that conditioning the availability of Rule 506(c) on such compliance could lead to disproportionate consequences in the event of non-compliance. Instead, we are proposing to amend existing Rule 507(a) so that Rule 506 would be unavailable for an issuer if such issuer, or any of its predecessors or affiliates, has been subject to any order, judgment or court decree enjoining such person for failure to comply with Rule 510T. As with proposed Rule 509, we believe that the possibility of disqualification from reliance on Rule 506 would provide issuers with sufficient incentive to comply with the requirement of Rule 510T, without penalizing them unfairly for an inadvertent error or failure to submit written general solicitation materials. We also believe that Rule 507(a), with its provision that disqualification would occur only if a court issues an injunction, may be better suited for addressing the varied facts and circumstances that may cause an issuer not to submit written general solicitation materials and for determining whether disqualification for this failure is appropriate.

As noted above, we are proposing Rule 510T as a temporary rule that will expire two years after the effective date of proposed Rule 510T. We believe that a two-year period would provide sufficient time for the Commission and the Commission staff to assess many of the market practices used to solicit potential purchasers of securities offered through Rule 506(c) offerings

[156] *See* notes 107 and 108.

[157] *See* letters from Massachusetts Securities Division (July 2, 2012); Ohio Division of Securities (July 3, 2012).

[158] *See* letters from Investor Advisory Committee; Consumer Federation.

[159] *See* letters from AFL–CIO and AFR; BetterInvesting (recommending that ''the SEC require all public solicitation materials under Rule 506 to be independently reviewed for compliance (perhaps by an independent authority such as FINRA, which already reviews broker-dealer advertising) before or after the public solicitation'' (emphasis omitted)); ICI.

[160] We do not contemplate that the submitted written general solicitation materials would be subject to a staff review similar to that conducted on Securities Act registration statements.

and determine whether further action is warranted.

Request for Comment

87. Should we require the submission of written general solicitation materials used in Rule 506(c) offerings, as proposed? Should oral communications that constitute general solicitation be required to be submitted in some form? If so, how should a requirement to submit general solicitation materials be applied to telephone solicitations, solicitations through broadcast media or oral communications?

88. What are the appropriate ramifications for an issuer that fails to submit written general solicitation materials? Should failure to submit general solicitation materials disqualify an issuer from using Rule 506 for future offerings without court action? Should a cure period be provided? Should submission of written general solicitation materials be a condition to the Rule 506(c) exemption?

89. What are the benefits and costs of requiring the submission of written general solicitation materials in Rule 506(c) offerings? If the staff were able to conduct only limited review of a small portion of the materials submitted, how does that impact an assessment of costs and benefits?

90. Should the submitted written general solicitation materials be made publicly available on the Commission's Web site? Would the availability of such materials on the Commission's Web site give undue credibility to the materials and create the impression that submitted materials have been reviewed and/or approved by the Commission?

91. Should written general solicitation materials be required to be submitted as an exhibit to Form D? Why or why not? Could submission of these materials publicly, through EDGAR or another means, have the effect of encouraging broadened investor interest in these offerings, beyond what the offerors would achieve by engaging in their own general solicitation efforts? Would this be in the interests of investors?

92. Should the written general solicitation materials be submitted at a time other than the date of first use of such materials? For example, currently, free writing prospectuses in the form of media publications or broadcasts that include information about the issuer, its securities, or the offering provided, authorized, or approved by or on behalf of the issuer or an offering participant and that are published or disseminated by unaffiliated media must be filed within four business days after the issuer or offering participant becomes aware of its publication or first broadcast. Should a similar deadline be considered for the submission of written general solicitation materials that are in the form of media publications or broadcasts and that include information provided or authorized by the issuer or an offering participant?

93. Should a requirement to submit written general solicitation materials be applied to all Rule 506(c) offerings, or should certain issuers or certain Rule 506(c) offerings be excluded or exempted from such a requirement? If yes, what issuers or offerings should be excluded or exempted? Should smaller issuers or smaller offerings be excluded or exempted?

94. As proposed, only the issuer relying on Rule 506(c) would have an obligation under Rule 510T to submit written general solicitation materials to the Commission, even if the materials were prepared and disseminated by an offering participant on behalf of the issuer. Should this requirement extend to the submission of all written general solicitation materials used by other offering participants in the same offering? Would this requirement further the Commission's assessment of the market practices used by issuers in Rule 506(c) offerings?

95. How would a requirement that written general solicitation materials be submitted to the Commission affect the amount or quality of information in such materials? How would it affect the use of Rule 506(c)?

96. Should the proposed requirement for issuers to submit written general solicitation materials be in the form of a temporary rule? Should this requirement be made a permanent one? If it is in the form of a temporary rule, is the proposed two-year period sufficient for purpose of understanding the market practices used by issuers to solicit potential purchasers in Rule 506(c) offerings?

V. Request for Comment on the Definition of ''Accredited Investor''

Many commenters stated, and we agree, that the definition of accredited investor as it relates to natural persons should be reviewed and, if necessary or appropriate, amended. Several commenters recommended that the accredited investor definition be revised to include a financial knowledge or investment experience component [161] and/or a threshold based on the amount of securities investments owned by the purchaser, which, in their view, may be a more appropriate proxy for financial sophistication.[162]

At the outset, we note that amending the definition of ''accredited investor'' raises a number of issues separate from the implementation of Section 201(a). The accredited investor definition is subject to a number of independent regulatory requirements that mandate review and consideration of the definition. For example, Section 415 of the Dodd-Frank Act mandates the completion of a study by the Government Accountability Office (''GAO'') regarding the appropriate criteria for determining the financial thresholds or other criteria for qualifying as an accredited investor not later than three years after the date of enactment of the Dodd-Frank Act, which would be July 20, 2013. Under Section 413(b) of the Dodd-Frank Act, the Commission is required to undertake a review of the accredited investor definition as it relates to natural persons in its entirety four years after the enactment of the Dodd-Frank Act, and once every four years thereafter. Also, Section 413(a) of the Dodd-Frank Act stipulates that the net worth standard shall be $1 million, excluding the value of a person's primary residence, until July 2014.

Because any change we would propose to the definition of accredited investor would benefit from our consideration of these mandated reviews as well as from the ability to consider modifications to the net worth standard, we are not proposing any amendments to the accredited investor definition at this time. Nonetheless, in light of the considerations that commenters raised, the Commission staff has begun a review of the definition of accredited investor as it relates to natural persons, including the need for any changes to this definition following the effectiveness of Rule 506(c). This review, which we anticipate will be completed in a timely manner, will encompass, among other things, both the question of whether net worth and annual income should be

[161] *See* letters from AARP; BetterInvesting; CFA Institute; Consumer Federation; ICI; Massachusetts Securities Division (July 2, 2012). One commenter recommended adding ''knowledgeable employees'' to the accredited investor definition. *See* letter from MFA (May 4, 2012). Another commenter suggested having the Commission offer investor education classes whereby investors who meet a lower financial threshold but pass a qualifying test could be granted accredited investor status. *See* letter from Cambridge Innovation Center (June 13, 2012).

All of the commenters that recommended that the Commission amend the definition of accredited investor focused on the definition as it relates to natural persons. *See, e.g.,* letters from AARP; AFL–CIO and AFR; BetterInvesting; CFA Institute; Consumer Federation; ICI; Investor Advisory Committee; Massachusetts Securities Division (July 2, 2012).

[162] *See* letters from AARP; Consumer Federation; ICI.

used as the tests for determining whether a natural person is an accredited investor and the question of what the thresholds should be for those and other potential tests. We believe that it would be appropriate to coordinate the review and consideration of the accredited investor definition required by Section 413(b) of the Dodd-Frank Act with the completion of the Commission staff's ongoing review and the GAO study.

Request for Comment

97. Are the net worth test and the income test currently provided in Rule 501(a)(5) and Rule 501(a)(6), respectively, the appropriate tests for determining whether a natural person is an accredited investor? Do such tests indicate whether an investor has such knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of a prospective investment? If not, what other criteria should be considered as an appropriate test for investment sophistication?

98. Are the current financial thresholds in the net worth test and the income test still the appropriate thresholds for determining whether a natural person is an accredited investor? Should any revised thresholds be indexed for inflation?

99. Currently, the financial thresholds in the income test and net worth test are based on fixed dollar amounts (such as having an individual income in excess of $200,000 for a natural person to qualify as an accredited investor). Should the net worth test and the income test be changed to use thresholds that are not tied to fixed dollar amounts (for example, thresholds based on a certain formula or percentage)?

VI. Additional Requests for Comment

We are also soliciting comment on the following additional matters:

100. Should it be a condition of Rule 506(c) that, prior to any sale of a security in reliance on the Rule, the purchaser shall have received an offering document containing specified information? If so, should such information requirements be the same as, or more or less inclusive than, the information requirements set forth in Rule 502(b) of Regulation D (which apply only when an issuer sells securities under Rule 505 or Rule 506 to a purchaser that is not an accredited investor)?

101. Should an issuer subject to the reporting requirements of Sections 13 or 15(d) of the Exchange Act be permitted to use Rule 506(c) if it is not current in its reporting obligations?

VII. General Request for Comment

We request and encourage any interested person to submit comments regarding the proposed rule and form amendments, specific issues discussed in this release, and other matters that may have an effect on the proposed rules. We request comment from the point of view of issuers, investors and other market participants. With regard to any comments, we note that such comments are of particular assistance to us if accompanied by supporting data and analysis of the issues addressed in those comments. Commenters are urged to be as specific as possible.

VIII. Paperwork Reduction Act

A. Background

The proposed rule and form amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[163] The titles of these requirements are:

- "Form D" (OMB Control No. 3235–0076);[164] and
- "Rule 506(c) General Solicitation Materials" (a proposed new collection of information).

We are submitting these requirements to the Office of Management and Budget ("OMB") for review and approval in accordance with the PRA and its implementing regulations.[165] We are applying for an OMB control number for the proposed new collection of information in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13, and OMB has not yet assigned a control number to the new collection. If adopted, responses to the new collection of information would be mandatory. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number.

B. Burden and Cost Estimates Related to the Proposed Amendments

1. Proposed Amendments Relating to Form D

We adopted Regulation D and Form D as part of the establishment of a series of exemptions for offerings and sales of securities under the Securities Act. Form D contains collection of information requirements, requiring an issuer to file a notice of sale of securities pursuant to Regulation D or Section 4(a)(5) of the Securities Act. The Form D is required to include basic information about the issuer, certain related persons and the offering. This information is needed for implementing the exemptions and evaluating their use. The information collection requirements related to the filing of Form D with the Commission are mandatory to the extent that an issuer elects to make an offering of securities in reliance on the relevant exemption. Responses are not confidential. The hours and costs associated with preparing and filing forms and retaining records constitute reporting and cost burdens imposed by the collection of information requirements.

We are proposing to require the advance filing of Form D for Rule 506(c) offerings and to require the filing of a closing amendment to Form D after the termination of all Rule 506 offerings. In addition, we are proposing to amend Item 2 of Form D to require the identification of the issuer's publicly accessible (Internet) Web site address, if any; Item 3 of Form D to require, in Rule 506(c) offerings, the name and address of controlling persons, in addition to the information currently required for "related persons;" Item 4 of Form D to require the issuer to briefly describe its industry group if the issuer checks the "Other" box; Item 5 of Form D to replace the "Decline to Disclose" option with a "Not Available to Public" option; Item 7 of Form D to add separate fields or check boxes for issuers to indicate whether they are filing a Form D in advance of a Rule 506(c) offering or a closing Form D amendment for a Rule 506 offering; Item 9 of Form D to require information on the ticker symbol and security identifier for the offered securities, if any; Item 14 of Form D to add a table requiring information, in regard to Rule 506 offerings, on the number of accredited investors and non-accredited investors, whether they are natural persons or entities, and the amount raised from each category of investor; and Item 16 of Form D to require information, if the issuer is not a pooled investment fund, on the percentage of the offering proceeds from a Rule 506 offering that was or will be used (1) to repurchase or retire the issuer's existing securities; (2) to pay offering expenses; (3) to acquire assets, otherwise than in the ordinary course of business; (4) to finance acquisitions of other businesses; (5) for working capital; and (6) to discharge indebtedness.

We are also proposing to add new items to Form D, which would require

[163] 44 U.S.C. 3501 *et seq.*

[164] Form D was adopted pursuant to Sections 2(a)(15), 3(b), 4(a)(2), 19(a) and 19(c)(3) of the Securities Act (15 U.S.C. 77b(a)(15), 77c(b), 77d(a)(2), 77s(a) and 77s(c)(3)).

[165] 44 U.S.C. 3507(d); 5 CFR 1320.11.

the following additional information in regard to offerings conducted under Rule 506: The number and types of accredited investors that purchased securities in the offering; for Rule 506(c) offerings, the methods used to verify accredited investor status and the types of general solicitation used; if a class of the issuer's securities is traded on a national securities exchange, ATS or any other organized trading venue, and/or is registered under the Exchange Act, the name of the exchange, ATS or trading venue and/or the Exchange Act file number and whether the securities being offered under Rule 506 are of the same class or are convertible into or exercisable or exchangeable for such class; if the issuer used a registered broker-dealer in connection with the offering, whether any general solicitation materials were filed with FINRA; and in the case of pooled investment funds, the name and SEC file number for each investment adviser who functions directly or indirectly as a promoter of the issuer.

We anticipate that if the proposed amendments to require the advance filing of Form D for Rule 506(c) offerings, the filing of a closing amendment to Form D after the termination of Rule 506 offerings, and additional information in Form D are adopted, the burden for responding to the collection of information in Form D would increase for most issuers. For purposes of the PRA, we estimate that the annual compliance burden of the collection of information requirements for issuers making Form D filings after these proposed amendments would be an aggregate 32,736 hours of issuer personnel time and $39,283,200 for the services of outside professionals per year. Our methodologies for deriving the above estimates are discussed below.

The table below shows the current total annual compliance burden, in hours and in costs, of the collection of information pursuant to Form D in connection with the rule and form amendments to implement Section 201(a) of the JOBS Act we are adopting today. For purposes of the PRA, prepared in connection with the amendments to Form D adopted today, we estimate that, over a three-year period, the average burden estimate will be four hours per Form D filing. Our burden estimate represents the average burden for all issuers. This burden is reflected as a one hour burden of preparation on the company and a cost of $1,200 per filing. In deriving these estimates, we assume that 25% of the burden of preparation is carried by the issuer internally and that 75% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

TABLE 1—ESTIMATED PAPERWORK BURDEN UNDER FORM D, PRE-AMENDMENTS TO REGULATION D AND FORM D

	Number of responses	Burden hours/form	Total burden hours	Internal issuer time	External professional time	Professional costs
	(A) [166]	(B)	(C) = (A) * (B)	(D)	(E)	(F) = (E) * $400
Form D	21,824	4	87,296	21,824	65,472	$26,188,800

We believe that the proposed amendments to Form D, if adopted, would increase the existing paperwork burden of the form by requiring additional information in Form D, particularly with respect to Rule 506 offerings. In addition, while we do not anticipate that these proposed rule and form amendments will result in an increase in the number of Regulation D offerings, we believe that the paperwork burden of the form would increase as a result of the advance filing requirement for Rule 506(c) offerings and the requirement to file an additional amendment after the termination of Rule 506 offerings.[167] We estimate that the paperwork burden associated with filing the required information on Form D over the span of a particular offering would increase to approximately 6 hours per offering.[168]

The table below illustrates the total annual compliance burden of the collection of information in hours and in cost under the proposed amendments to Regulation D and Form D. The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take an issuer to prepare and review a Form D filing consistent with the assumptions above. We continue to estimate that 25 percent of the burden of preparation is carried by the company internally and that 75 percent of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

TABLE 2—ESTIMATED PAPERWORK BURDEN UNDER FORM D, POST-AMENDMENTS TO REGULATION D AND FORM D

	Number of responses	Burden hours/form	Total burden hours	Internal issuer time	External professional time	Professional costs
	(A)	(B)	(C) = (A) * (B)	(D)	(E)	(F) = (E) * $400
Form D	21,824	6	130,944	32,736	98,208	$39,283,200

[166] The information in this column is based on the 18,187 new Form D filings that were actually made in 2012, plus the additional 3,637 filings we estimate would be filed in the first year after the effective date of Rule 506(c).

[167] As discussed in Section IX.B.4.a of this release, there is evidence that some issuers are not filing Form D for their offerings in compliance with Rule 503.

[168] The estimate of approximately 6 hours per offering is a blended average of the paperwork burden for all offerings for which a Form D is required to be filed, not only offerings under Rule 506.

2. Rule 506(c) General Solicitation Materials

We are proposing new Rule 510T of Regulation D to require that an issuer conducting an offering in reliance on Rule 506(c) submit to the Commission any written general solicitation materials prepared by or on behalf of the issuer and used in connection with the Rule 506(c) offering. Under the proposed rule, the written general solicitation materials must be submitted to the Commission through an intake page on the Commission's Web site no later than the date of first use of such materials in the offering. Written general solicitation materials submitted to the Commission in this manner would not be publicly available on the Commission's Web site. We are proposing Rule 510T as a temporary rule that will expire two years after the effective date of proposed Rule 510T. In addition, we are proposing a number of legends and other disclosures that would need to be included in written general solicitation materials used in Rule 506(c) offerings. All such materials would need to disclose that only accredited investors can purchase in the Rule 506(c) offering. All such materials used by private funds would need to disclose that the securities offered are not subject to the protections of the Investment Company Act. And finally, any private fund that includes performance data in its written general solicitation materials would need to disclose certain information about the performance data. We propose to prescribe the basic elements of the disclosures but not the exact wording. We do not believe that any of the disclosures would be burdensome to prepare.

For purposes of the PRA, we estimate that the annual compliance burden of this collection of information requirement for issuers conducting Rule 506(c) offerings would be an aggregate 7,274 hours of issuer personnel time. We estimate that compliance with the proposed requirements related to written general solicitation materials would result in an estimated burden of two hours per offering under Rule 506(c). This estimated two hour burden includes the time it would take to prepare any applicable disclosures for the written general solicitation materials and to submit such materials through the Commission's Web site. Our burden estimate represents the average burden for all issuers per Rule 506(c) offering. In deriving this estimate, we assume that 100% of the burden of preparation will be carried by the issuer internally, which is reflected as an hourly burden.

Although it is not possible to predict the number of future offerings made in reliance on Rule 506(c) with any degree of accuracy, particularly because Rule 506(c) is not yet effective, for purposes of this analysis we estimate that there would be 3,637 Rule 506(c) offerings per year.[169] We assume for purposes of this analysis that all Rule 506(c) offerings will involve the use of written general solicitation materials.[170] Based on this estimated number of Rule 506(c) offerings and an estimated burden of two hours per Rule 506(c) offering, we estimate that the annual compliance burden of this collection of information requirement for the first year in which issuers would be required to submit written general solicitation materials to the Commission pursuant to Rule 510T would be an aggregate of 7,274 hours of issuer personnel time.

C. Request for Comment

We request comment in order to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of our estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090, with reference to File No. S7–06–13. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–06–13, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street NE., Washington, DC 20549. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

IX. Economic Analysis

As directed by Section 201(a)(1) of the JOBS Act, the Commission has amended Rule 506 of Regulation D to permit general solicitation for offers and sales of securities made pursuant to Rule 506, provided that all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify their accredited investor status. This rule amendment has raised a number of concerns with respect to the Commission's ability to evaluate and assess the changing nature of the Rule 506 market and investor awareness of the risks associated with offerings under Rule 506(c). We are proposing amendments to Regulation D, Form D and Rule 156 of the Securities Act to address these concerns.

The proposed amendments to Form D and Regulation D as it relates to Form D would:

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[169] As a reference point for the potential increase in the total number of Rule 506 offerings after the adoption of Rule 506(c), we use the impact of another past rule change on the market for Regulation D offerings. In 1997, the Commission amended Rule 144(d) under the Securities Act [17 CFR 230.144(d)] to reduce the holding period for restricted securities from two years to one year, thereby increasing the attractiveness of Regulation D offerings to investors and to issuers. *See Revision of Holding Period Requirements in Rules 144 and 145,* Release No. 33–7390 (Feb. 20, 1997) [62 FR 9242 (Feb. 28, 1997)]. There were 10,341 Form D filings in 1996. This was followed by a 20% increase in the number of Form D filings in each of the subsequent three calendar years, reaching 17,830 by 1999. We assume that there could be a similarly significant increase in the overall number of Rule 506 offerings following the adoption of Rule 506(c). We also assume, for purposes of this analysis, that this 20% increase will be comprised entirely of Rule 506(c) offerings because of the benefits to issuers in using general solicitation, including wider access to accredited investors, and because non-accredited investors reportedly purchased securities in only 11% of the Rule 506 offerings conducted between 2009 and 2012. *See* Ivanov/Bauguess Study.

According to DERA, for the year ended December 31, 2012, there were 18,187 new Form D filings. A 20% increase in this number would result in a total of 21,824 new Regulation D offerings. Assuming the entire 20% increase is comprised of Rule 506(c) offerings, this would result in an estimated 3,637 Rule 506(c) offerings per year after adoption of the rule.

[170] Not all Rule 506(c) offerings will involve the use of written general solicitation materials and not all private funds will include performance data in their written general solicitation materials but we cannot predict with any degree of accuracy how issuers will conduct their Rule 506(c) offerings. Therefore, for purposes of this analysis, we are assigning two hours per Rule 506(c) offering, which we think represents a reasonable estimate of the average cost to issuers in Rule 506(c) offerings of complying with the proposed information requirements related to written general solicitation materials.

- Require the advance filing of Form D in Rule 506(c) offerings;
- require the filing of a closing amendment to Form D after the termination of a Rule 506 offering;
- require issuers to provide additional information in Form D primarily in regard to Rule 506 offerings; and
- disqualify an issuer from relying on Rule 506 for future offerings until one year after the required Form D filings are made if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with Form D filing requirements in a Rule 506 offering.

These proposed amendments are intended to enhance the Commission's ability to evaluate the development of market practices in Rule 506 offerings. In addition, these proposed amendments are expected to support and facilitate examination and enforcement efforts by the Commission and other regulators.

We are also proposing a new rule in Regulation D and an amendment to Rule 156 designed to address investor protection concerns arising from the ability of issuers to engage in general solicitation in their Rule 506(c) offerings. The new rule and the amendment to Rule 156 would:

- Require written general solicitation materials used in these offerings to include certain legends and other disclosures; and
- extend the interpretive guidance contained within Rule 156 to the sales literature of private funds.

Further, we are soliciting comment on whether manner or content restrictions should be imposed on general solicitation materials used by private funds.

We are proposing a new rule in Regulation D to require issuers, on a temporary basis, to submit any written general solicitation materials used in their Rule 506(c) offerings to the Commission. Such materials would be required to be submitted through an intake page on the Commission's Web site no later than the date of the first use of the materials in a Rule 506(c) offering. If adopted, this new rule would expire two years after the effective date of the rule.

We are mindful of the costs imposed by and the benefits obtained from our rules. The discussion below addresses the potential economic effects of these proposed amendments, including the likely benefits and costs of the amendments and their potential impact on efficiency, competition and capital formation.[171] These costs and benefits are not a result of the statutory mandate of Section 201(a) and are affected by the discretion we may exercise in implementing measures to supplement the implementation of the statutory mandate as contained in the amendments we are adopting today.

A. Broad Economic Considerations

As we highlight in our baseline analysis below, we note that a large percentage of current Rule 506 offerings are conducted by small issuers, which is consistent with the original Commission initiative in the early 1980s to facilitate capital formation by small issuers.[172] We stated at that time that an important purpose of the Form D filing requirement was ''to collect empirical data which will provide a basis for further action by the Commission either in terms of amending existing rules and regulations or proposing new ones. Further, the proposed Form would allow the Commission to elicit information necessary in assessing the effectiveness of Regulation D as a capital raising device for small businesses.'' [173]

As previously noted, we substantially revised Form D in 2008 to mandate its filing in electronic form.[174] At that time, we highlighted that a searchable electronic database of machine-readable filings would enable both federal and state securities regulators to analyze exempt securities transactions more effectively, thereby improving coordination among regulators and enhancing investor protections.[175] Since the adoption of the electronic Form D, we have been able to systematically extract information from the machine-readable filings, which are the best source of data about Rule 506 offerings and the basis of the baseline information provided below.

With the adoption of Rule 506(c), issuers are expected to have access to a greater number of capital sources because they will be able to generally solicit investors through a variety of means, thereby lowering search costs. While participating investors must be accredited investors, and Rule 506(c) requires issuers to take reasonable steps to verify that such persons are accredited investors, it is possible that some verification methods could lead to participation by non-accredited investors. Non-accredited investors who are not detected by reasonable verification methods could then participate in Rule 506(c) offerings for which they may not be well suited. There is also an increased likelihood of non-accredited investor participation in Rule 506(c) offerings if verification methods are deficient. Both of these likelihoods increase with issuers' ability to generally solicit their offers to an audience of potential investors through broader communication and advertising channels.

The proposed enhancements to the Form D filing requirements are prompted, in part, by the additional investor protection concerns associated with the ability to generally solicit private offerings. The proposed additional information and filing requirements should also enable the Commission to better evaluate the effectiveness of general solicitation in raising capital for small businesses.

All of these proposed rules could also impose certain costs on issuers, including filing burdens, reduced flexibility in offering methods and disclosure of potentially sensitive information. We discuss these potential costs in relation to the anticipated benefits in the sections below.

B. Economic Baseline

To assess the economic impact of the proposed rules, we are using as our baseline the regulation of private offerings as it exists today, including the adoption of Rule 506(c), which removes the prohibition on general solicitation for offerings under Rule 506. We also include in our baseline the provisions enacted with the adoption of the bad actor rule, which disqualifies issuers and other market participants from relying on Rule 506 if ''felons and other 'bad actors''' are participating in the offering. Because these provisions are being adopted today, the information provided below regarding the current state of the private offering market in the United States does not include data related to the use of general solicitation in Rule 506(c) offerings or the disqualification of bad actors, because no such data exist. Hence, some of our analysis of the potential impact of the proposed rules considers the anticipated

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[171] Section 2(b) of the Securities Act and Section 3(f) of the Exchange Act require the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. 15 U.S.C. 77b(b); 15 U.S.C. 78c(f). Section 23(a)(2) of the Exchange Act requires the Commission, in adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. 15 U.S.C. 78w(a)(2).

[172] Form D and Regulation D were adopted in 1982. Release No. 33–6389 (adopting Form D as a replacement for Forms 4(6), 146, 240 and 242).

[173] Release No. 33–6339.

[174] *See* Release No. 33–8891.

[175] *Id.*

effects of the adoption of Rules 506(c) and 506(d). As a result, many of the potential costs and benefits are difficult to quantify with any degree of certainty, especially as the practices of market participants are expected to evolve and adapt to the ability to generally solicit in Rule 506(c) offerings. To the extent applicable, we will consider developments in the private offering market subsequent to the adoption of today's rule amendments in any future assessment of the potential economic impact of the rules proposed today.

The baseline analysis that follows is in large part based on information collected from Form D filings submitted by issuers relying on Regulation D to raise capital, which is based on issuer reporting practices and requirements that could change because of the proposed amendments. As we describe in more detail below, we believe that we do not have a complete view of the Rule 506 market, particularly with respect to the amount of capital raised. Currently, issuers are required to file an initial Form D within 15 days of the first sale of securities, and are required to report additional sales through amended filings only under certain conditions. In addition, issuers do not report all required information, either due to error or because they do not wish to make the information public. Commenters have suggested and we also have evidence that some issuers are not filing a Form D for their offerings in compliance with Rule 503.[176] Consequently, the analysis that follows is necessarily subject to these limitations in the current Form D reporting process.

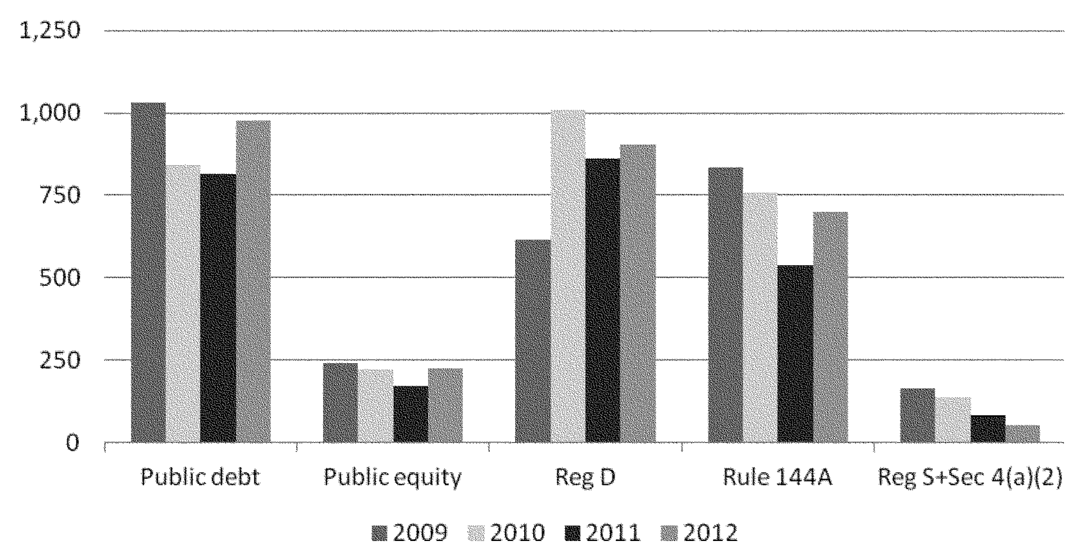
Some of the proposed rules, such as an Advance Form D filing for Rule 506(c) offerings, a closing Form D amendment for Rule 506 offerings, and expanded information requirements in Form D primarily in regard to Rule 506 offerings, seek to address these reporting limitations and are intended to result in more complete information on the Rule 506 market.

1. Size of the Exempt Offering Market

Exempt offerings play a significant role in capital formation in the United States. Offerings conducted in reliance on Rule 506 account for 99% of the capital reported as being raised under Regulation D from 2009 to 2012, and represent approximately 94% of the number of Regulation D offerings.[177] The significance of Rule 506 offerings is underscored by the comparison to registered offerings. In 2012, the estimated amount of capital reported as being raised in Rule 506 offerings (including both equity and debt) was $898 billion, compared to $1.2 trillion raised in registered offerings.[178] Of this $898 billion, operating companies (issuers that are not pooled investment funds) reported raising $173 billion, while pooled investment funds reported raising $725 billion.[179] The amount reported as being raised by pooled investment funds is comparable to the amount of capital raised by registered investment funds. In 2012, registered investment funds (which include money market mutual funds, long-term mutual funds, exchange-traded funds, closed-end funds and unit investment trusts) raised approximately $727 billion.[180]

In 2011, the estimated amount of capital (including both equity and debt) reported as being raised in Rule 506 offerings was $849 billion compared to $985 billion raised in registered offerings.[181] Of the $849 billion, operating companies reported raising $71 billion, while pooled investment funds reported raising $778 billion.[182] More generally, when including offerings pursuant to other exemptions—Rule 144A, Regulation S and Section 4(a)(2)—significantly more capital appears to be raised through exempt offerings than registered offerings (Figure 1).[183]

Figure 1: Capital Raised in U.S. Capital Markets during 2009-2012[184]



[176] *See* note 85.

[177] *See* Ivanov/Bauguess Study.

[178] *See id.*

[179] *See id.*

[180] In calculating the amount of capital raised by registered investment funds, we use the net amounts (plus reinvested dividends and reinvested capital gains), which reflect redemptions, and not gross amounts, by open-ended registered investment funds because they face frequent redemptions, and do not have redemption restrictions and lock-up periods common among private funds. In addition, we use the new issuances of registered closed-end funds and the new deposits of registered unit investment trusts. *See* 2013 Investment Company Institute Factbook, *available at http://www.icifactbook.org.*

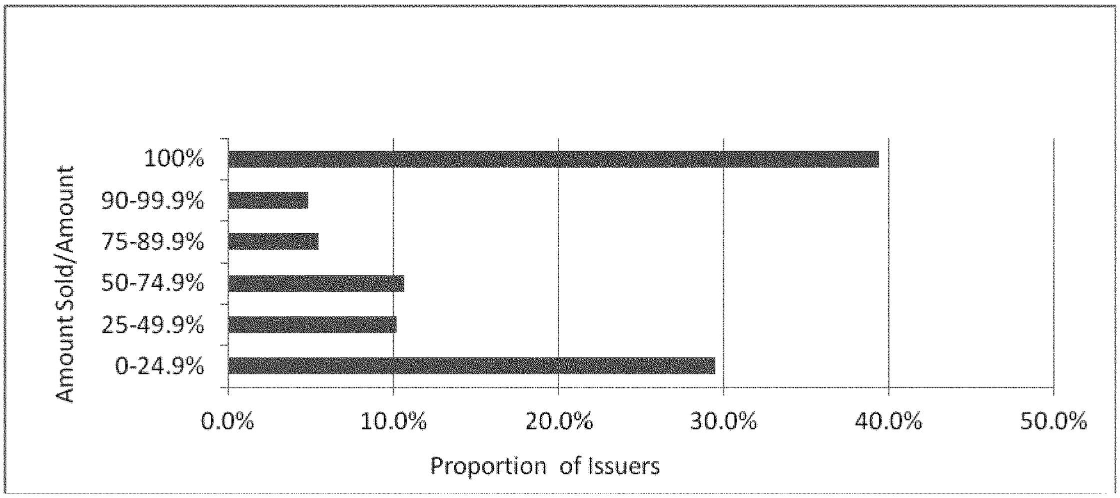
[181] *See* Ivanov/Bauguess Study.

[182] *See id.*

[183] *See id.*

At present, issuers are required to file a Form D not later than 15 days after the first sale of securities in a Regulation D offering and an amendment to the Form D only under certain circumstances. Since issuers are not required to submit a filing when an offering is completed, and submit amendments only under certain circumstances, we have no definitive information on the final amounts raised. Figure 2, below, illustrates that at the time of the initial Form D filing, only 39% of offerings by non-pooled investment fund issuers were completed relative to the total amount sought. Separately, 70% of pooled investment funds state their total offering amount to be ''Indefinite'' in their Form D filings. As a result, the initial Form D filings of these pooled investment funds likely do not accurately reflect the total amount of securities offered or sold.

Figure 2: Amount Sold as Percentage of Total Offering Amount by Non-Pooled Investment Fund Issuers in Regulation D Offerings at the Time of Form D Filing: 2009-2012



2. Affected Market Participants

The amendments to Rule 506 we are adopting today in a separate release will affect a number of different market participants. Issuers of securities in Rule 506 offerings include both reporting and non-reporting operating companies and pooled investment funds. Investment advisers organize and sponsor pooled investment funds that conduct Rule 506 offerings. Intermediaries that facilitate Rule 506 offerings include registered broker-dealers, finders and placement agents. Investors in Rule 506 offerings include accredited investors (both natural persons and legal entities) and non-accredited investors who meet certain ''sophistication'' requirements. Affected market participants might also include investors that are not eligible to participate in Rule 506(c) offerings, but do because of poor investor verification standards or fraudulent activities. Each of these market participants is discussed in further detail below.

a. Issuers

Based on the information submitted in 112,467 new and amended Form D filings between 2009 and 2012, there were 67,706 new Regulation D offerings by 49,740 unique issuers during this four-year period.[185] The size of the average Regulation D offering during this period was approximately $30 million, whereas the size of the median offering was approximately $1.5 million.[186] The difference between the average and median offering sizes indicates that the Regulation D market is comprised of many small offerings, which is consistent with the view that many smaller businesses are relying on Regulation D to raise capital, and a smaller number of much larger offerings.

Some information about issuer size is available from Item 5 in Form D, which requires issuers in Regulation D offerings to report their size in terms of revenue ranges or, in the case of pooled investment funds, net asset value ranges. All issuers can currently choose not to disclose this size information, however, and a significant majority of issuers that are not pooled investment funds declined to disclose their revenue ranges in the Forms D that they filed between 2009 and 2012. For those that did, most reported a revenue range of less than $1 million (Figure 3).[187] During the 2009–2011 period, approximately 10% of all public companies raised capital in Regulation D offerings; in 2012, approximately 6% of such companies did so.[188] These public companies tended to be smaller and less profitable than their industry peers, which illustrates the importance of the private capital markets to smaller companies, whether public or private.[189]

[184] The 2012 non-ABS Rule 144A offerings data is based on an extrapolation of currently available data through May 2012 from Sagient Research System's Placement Tracker database. For more detail, see the Ivanov/Bauguess Study.

[185] *See* Ivanov/Bauguess Study.

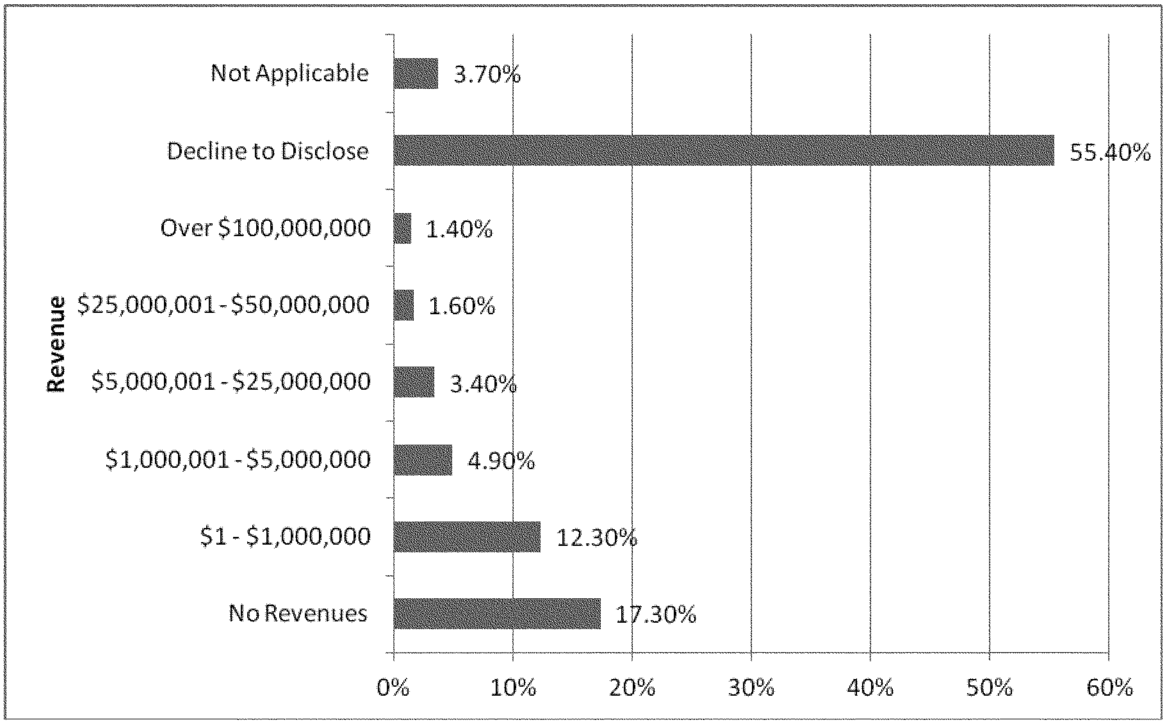
[186] *See id.* The average and median amounts are calculated based on the amounts sold by Regulation D issuers as reported in their Form D filings. A study of unregistered equity offerings by publicly-traded companies over the period 1980–1996 finds that the mean offering amount was $12.7 million, whereas the median offering amount was $4.5 million. *See* Michael Hertzel, Michael Lemmon, James Linck and Lynn Rees, *Long-Run Performance Following Private Placements of Equity,* 57 Journal of Finance 2595 (2002).

[187] *See* Ivanov/Bauguess Study.

[188] *Id.* (explaining methodology of using listings in the Standard & Poor's Compustat database and the University of Chicago's Center for Research in Securities Prices database to determine which companies were public companies).

[189] *Id.*

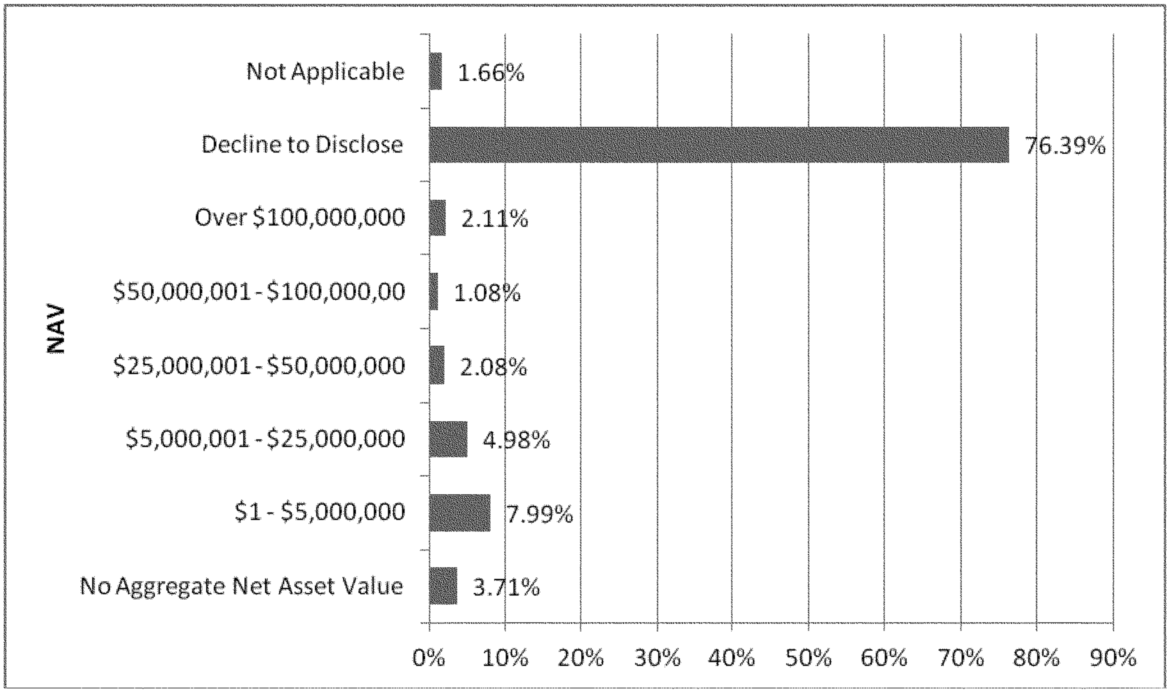
Figure 3: Distribution of Non-Pooled Investment Fund Issuers in Regulation D Market by Revenue: 2009-2012



During this period, pooled investment funds conducted approximately 24% of the total number of Regulation D offerings and raised approximately 81% of the total amount of capital raised in Regulation D offerings.[190] More than 75% of pooled investment funds declined to disclose their net asset value range. The proposed amendments to Form D would eliminate this voluntary choice to decline to report fund size (or issuer size for those that are not pooled investment funds), except for issuers who do not include such information in general solicitation materials under Rule 506(c) or otherwise make this information publicly available.

[190] *Id.*

Figure 4: Distribution of Pooled Investment Fund Issuers in Regulation D Market by Net Asset Value: 2009-2012



Between 2009 and 2012, approximately 66% of Regulation D offerings were of equity securities, and almost two-thirds of these were by issuers other than pooled investment funds.[191] Non-U.S. issuers accounted for approximately 19% of the amount of capital raised in Regulation D offerings, indicating that the U.S. market is a significant source of capital for these issuers.[192]

b. Investors

We have relatively little information on the types and number of investors in Rule 506 offerings. Form D currently requires issuers in Rule 506 offerings to provide information about the total number of investors who have already invested in the offering and the number of persons who do not qualify as accredited investors.[193] In 2012, approximately 153,000 investors participated in offerings by operating companies, while approximately 81,000 investors invested in offerings by pooled investment funds.[194] Because some investors participate in multiple offerings, these numbers likely overestimate the actual number of unique investors in these reported offerings. We do not know what fraction of these investors are natural persons or entities because Form D does not require any other information on the types of investors.[195] In offerings under Rule 506(b), both accredited investors and up to 35 non-accredited investors who meet certain ''sophistication'' requirements are eligible to purchase securities. In offerings under new Rule 506(c), only accredited investors will be eligible to purchase securities.

Information collected from Form D filings indicates that most Rule 506 offerings do not involve broad investor participation. More than two-thirds of these offerings have ten or fewer investors, while less than 5% of these offerings have more than 30 investors. Although Rule 506 currently allows for the participation of non-accredited investors who meet certain sophistication requirements, such non-accredited investors purchased securities in only 11% of the Rule 506 offerings conducted between 2009 and 2012.[196] Only 8% of the offerings by pooled investment funds included non-accredited investors, compared to 12% of the offerings by other issuers.[197]

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[191] *Id.*

[192] *Id.*

[193] *See* Item 14 of Form D. Form D does not require any other information on the types of investors, such as whether they are natural persons or legal entities.

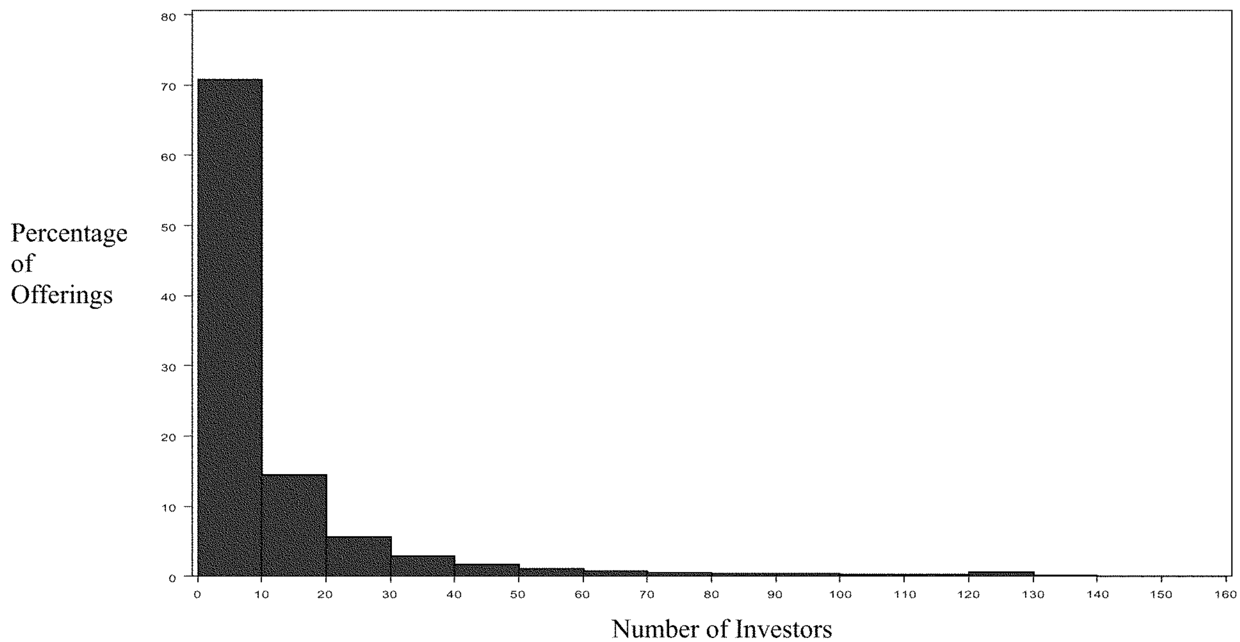
[194] These numbers are based on initial Form D filings submitted in 2012.

[195] *See* Item 14 of Form D.

[196] *See* Ivanov/Bauguess Study.

[197] *Id.*

Figure 5: Distribution of Regulation D Offerings by Number of Investors: 2009-2012



As stated above, between 2009 and 2012, the size of the median Regulation D offering, based on the information in Form D filings, was approximately $1.5 million. The presence of so many relatively small offerings suggests that a sizable number of current investors in Rule 506 offerings are natural persons or legal entities in which all equity owners are natural persons. This is because smaller offerings may not provide sufficient scale for institutional investors to earn a sizable return. Institutional investors typically have a larger investible capital base and more formal screening procedures compared to investors who are natural persons, and the associated costs of identifying potential investments and monitoring their investment portfolio lead them to make larger investments than natural persons.[198] As for whether natural persons investing in these offerings are accredited investors or non-accredited investors, almost 90% of the Regulation D offerings conducted between 2009 and 2012 did not involve any non-accredited investors.[199]

While we do not know what percentage of investors in Rule 506 offerings are natural persons, the vast majority of Regulation D offerings are conducted without the use of an intermediary,[200] suggesting that many of the investors in Regulation D offerings likely have a pre-existing relationship with the issuer or its management because these offerings would not have been conducted using general solicitation. This category of investors is likely to be much smaller than the total number of eligible investors for Rule 506(c) offerings, which is potentially very large. We estimate that at least 8.7 million U.S. households, or 7.4% of all U.S. households, qualified as accredited investors in 2010, based on the net worth standard in the definition of ''accredited investor'' (Figure 6).[201]

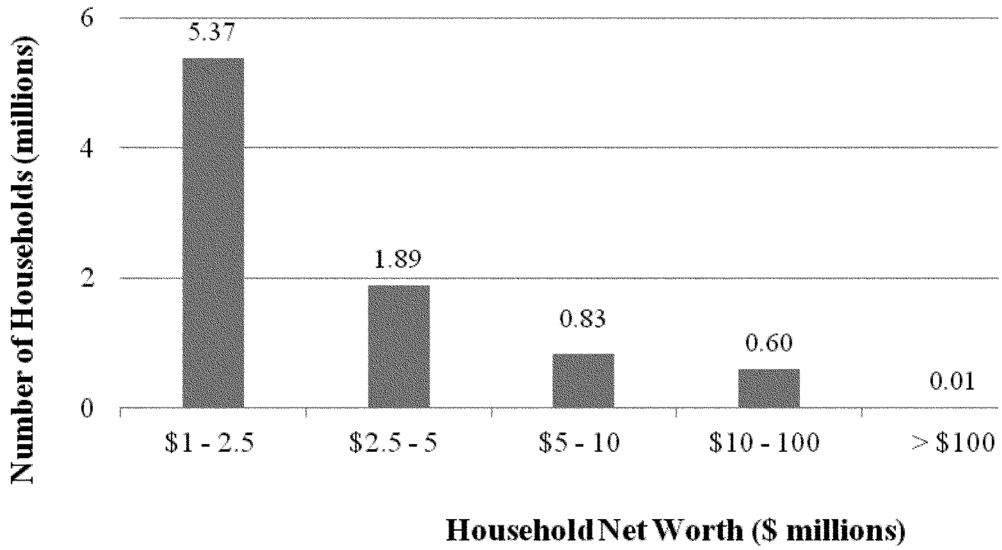
[198] *See, e.g.,* George Fenn, Nellie Liang and Stephen Prowes, The Economics of Private Equity Markets (1998); Steven Kaplan and Per Strömberg, *Leveraged Buyouts and Private Equity,* 23 Journal of Economic Perspectives 121 (2009).

[199] *See* Ivanov/Bauguess Study.

[200] An analysis of all Form D filings submitted between 2009 to 2012 shows that approximately 11% of all new offerings reported sales commissions of greater than zero because the issuers used intermediaries. *See* Ivanov/Bauguess Study. We assume that the lack of a commission indicates the absence of an intermediary.

[201] This estimate is based on net worth and household data from the Federal Reserve Board's Triennial Survey of Consumer Finances 2010. Our calculations are based on all 32,410 observations in the 2010 survey.

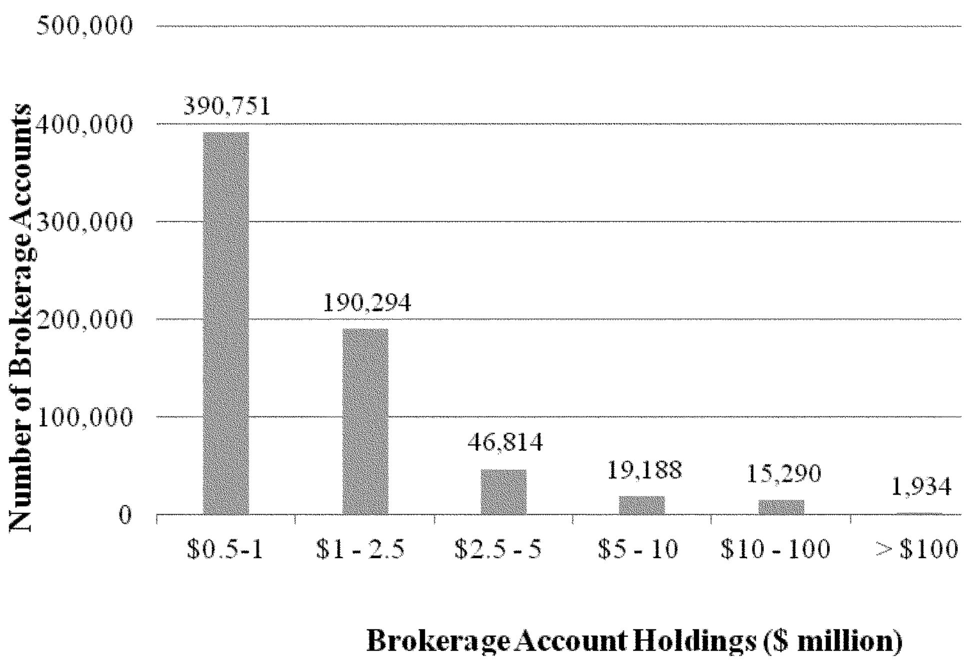
Figure 6: Number of U.S. Households that Qualify as Accredited Investors Based on 2010 Net Worth



Our analysis, however, leads us to believe that only a small percentage of these households are likely to participate in securities offerings, especially exempt offerings. First, as mentioned above, data from Form D filings in 2012 suggests that fewer than 234,000 investors (of which an unknown subset are natural persons) participated in Regulation D offerings, which is small compared to the 8.7 million households that qualify as accredited investors. Second, evidence suggests that only a small fraction of the total accredited investor population has significant levels of direct stockholdings. Based on an analysis of retail stock holding data for 33 million brokerage accounts in 2010, only 3.7 million accounts had at least $100,000 of direct investments in equity securities issued by public companies listed on domestic national securities exchanges, while only 664,000 accounts had at least $500,000 of direct investments in such equity securities (Figure 7).[202] Assuming that investments in publicly-traded equity securities are a gateway to investments in securities issued in exempt offerings, and accredited investors with investment experience in publicly-traded equity securities are more likely to participate in an exempt offering than accredited investors who do not, the set of accredited investors likely to be interested in investing in Rule 506(c) offerings could be significantly smaller than the total accredited investor population.

[202] This analysis by DERA is based on the stock holdings of retail investors from more than 100 brokerage firms covering more than 33 million accounts during the period June 2010-May 2011.

Figure 7: Direct Stock Holdings of Retail Investors, 2010



c. Investment Advisers

As of December 2012, there were 10,870 Commission-registered investment advisers that filed Form ADV with the Commission, representing approximately $50 trillion total assets under management.[203] The average investment adviser registered with the Commission has assets under management of approximately $4.6 billion; the median size of assets under management for these registered investment advisers is $258 million.

Approximately one-fourth of registered investment advisers (2,842) currently advise (or advised) private funds that filed Form D between 2002 and 2012, while another 1,250 registered investment advisers currently advise (or advised) private funds that did not file Form D during the same period. The registered investment advisers advising private funds that submitted Form D filings during this period had average assets under management of $8.7 billion, while the ones advising private funds that did not submit Form D filings had average assets under management of $8.6 billion. Registered investment advisers that did not advise private funds (6,623) are considerably smaller, with average assets under management of $2.1 billion.

d. Broker-Dealers

As of December 2012, there were 4,450 broker-dealers registered with the Commission who file on Form X–17A–5, with average total assets of approximately $1.1 billion per broker-dealer. The aggregate total assets of these registered broker-dealers are approximately $4.9 trillion. Of these registered broker-dealers, 410 are dually registered as investment advisers. The dually registered broker-dealers are larger (average total assets of $6.4 billion) than those that are not dually registered. Among the dually registered broker-dealers, we identified 24 that currently have or have had private funds that submitted Form D filings between 2002 and 2012.

3. Incidence of Fraud in Securities Offerings

As discussed above, commenters expressed concern that the use of general solicitation in Rule 506(c) offerings could lead to greater incidence of fraud in this market as those seeking to conduct fraudulent offerings would be able to directly solicit unsophisticated investors. Our principal source of data about the Rule 506 market is Form D filings and the incidence of fraud detected by us and other regulators. Because data on the incidence of fraud in private securities offerings is extremely limited, we are unable to estimate the extent of fraud in the existing market for privately offered securities or the degree, if any, to which such fraud may increase upon the adoption of Rule 506(c).

Some commenters suggested that we look to our experience with offerings conducted pursuant to Rule 504, as amended in 1992, as a means of evaluating the potential for fraud in the Rule 506(c) market. We do not believe that our experience with the 1992 amendments to Rule 504 is particularly instructive with respect to the potential incidence of fraud resulting from our implementation of Section 201(a) of the JOBS Act.[204]

[203] For the same time period, 2,303 exempt reporting advisers filed a Form ADV with the Commission. Certain investment advisers that are ineligible to register with the Commission may also be exempt from registration with any state.

[204] In 1992, when we amended Rule 504 to eliminate the prohibition against general solicitation, we also provided that the securities issued in these Rule 504 offerings would not be ''restricted securities'' for purposes of resale pursuant to Rule 144 under the Securities Act. As a result, a non-reporting company could sell up to $1 million of immediately freely-tradable securities in a 12-month period and be subject only to the antifraud and civil liability provisions of the federal securities laws.

By 1998, we concluded that securities issued in these Rule 504 offerings facilitated a number of fraudulent secondary transactions in the over-the-counter markets, and that these securities were issued by ''microcap'' companies, characterized by thin capitalization, low share prices and little or no analyst coverage.

Moreover, we stated that, while ''we believe that the scope of abuse is small in relation to the actual

Several commenters echoed concerns regarding the potential of fraud related to private funds in the Rule 506(c) market.[205] Empirical evidence on the extent of fraud involving private funds is not readily available. While a few economic studies suggest that certain hedge funds engage in various types of misreporting, such as misrepresenting past performance,[206] delaying disclosure of returns [207] and inflating returns at the end of the fiscal year in order to earn higher fees,[208] these studies do not provide information about the extent or magnitude of any such misreporting activities. In a 2003 report, the Commission staff noted that there was no evidence that hedge funds were disproportionately involved in fraudulent activity and that the charges brought by the Commission in 38 enforcement actions against hedge fund advisers and hedge funds between 1999 and 2003 were similar to the charges against other types of investment advisers.[209] Evidence on the extent of fraud involving other types of pooled investment funds also is sparse. A more recent study has identified 245 lawsuits (both federal and state) involving 200 venture capitalists as defendants between 1975 and 2007, and has shown that venture capital funds that are older and have a larger presence in terms of size and network are less likely to be sued.[210]

For comparison purposes, a recent study using enforcement actions brought by the Commission and private securities class action lawsuits to measure the incidence of fraud in the registered offering market found that approximately 3% of registered initial public offerings during the period from 1995 to 2007 were associated with allegations of fraud.[211] This study used the filing of a securities lawsuit against an issuer for financial misreporting during the initial public offering process as the proxy for detected fraud. The analysis covered 3,297 initial public offerings that resulted in 110 cases. The study determined that the incidence of fraud increased to 12% when securities law violations committed in years subsequent to the initial public offering were included. These are cases where fraud was detected and the Commission filed or instituted enforcement action; at best, they represent a lower bound on incidence of fraud in those markets.

While we cannot estimate the extent of fraud in the market for privately offered securities, we do know, based upon our own experience enforcing the federal securities laws and the enforcement efforts of criminal authorities and state securities regulators, that fraud exists in this market. One of the primary objectives of the amendments to Regulation D and Form D being proposed today is to increase the information available to the Commission about the Rule 506 market so that we can better assess, and, if necessary, take steps to respond to, fraudulent practices in the market for privately offered securities.

4. Current Practices

The potential economic impact of the proposed amendments will depend on the current practices of issuers and market participants in Rule 506 offerings—specifically, on the extent to which issuers currently file Form D and their incentives for doing so in the future. The analysis below provides an assessment of current compliance rates with respect to Form D filing requirements.

a. Missing Form D Filings

Issuers that use an exemption under Regulation D to raise capital are required to file a Form D not later than 15 days after the first sale of securities in the offering; however, the filing of Form D is not a condition to the use of Regulation D. Commenters have indicated that a number of issuers in Regulation D offerings do not file the form, even though the filing of Form D is a requirement of Regulation D. Assessing the prevalence of current non-compliance is difficult because a Form D filing is often the only public record of a Regulation D offering. We can provide an estimate of filing compliance for issuers under Rule 506 that use a registered broker-dealer in these offerings and for private funds that are managed by a Commission-registered investment adviser.[212] Because information related to private offerings for these sets of issuers is available in other filings, we can determine, in certain cases, when a Form D should have been but was not filed. In the analyses below, we present evidence on the corresponding rate at which we observe Form D filings. It should be noted that our estimates are subject to some degree of error because in some instances it is possible that that a Form D was filed even though we could not match it to a specific offering. In other instances, a Form D may not have been filed because the issuer may be relying on another exemption from Securities Act registration that does not require a Form D filing, such as the statutory exemption under Section 4(a)(2). Our estimates of compliance for issuers that use a registered investment adviser or broker-dealer also may not reflect the rate of compliance among issuers that do not. To the extent that Forms D are more likely to be filed when a registered entity is involved, there could be a greater rate of non-compliance among the remaining Rule 506 offerings that do

usage of the exemption, we also believe that a regulatory response may be necessary.'' As the freely-tradable nature of the securities facilitated the fraudulent secondary transactions, we proposed to ''implement the same resale restrictions on securities issued in a Rule 504 transaction as apply to transactions under the other Regulation D exemptions,'' in addition to reinstating the prohibition against general solicitation. Although we recognized that resale restrictions would have ''some impact upon small businesses trying to raise 'seed capital' in bona fide transactions,'' we believed that such restrictions were necessary so that ''unscrupulous stock promoters will be less likely to use Rule 504 as the source of the freely tradable securities they need to facilitate their fraudulent activities in the secondary markets.'' *Revision of Rule 504 of Regulation D, the ''Seed Capital'' Exemption,* Release No. 33–7541 (May 21, 1998) [63 FR 29168, 29169].

In contrast, issuers using Rule 506(c) can sell only to accredited investors, and the securities issued in these offerings are deemed to be ''restricted securities'' for purposes of resale under Rule 144. As a result, schemes involving price manipulation to defraud unknowing investors in the immediate resale of securities purchased directly from issuers (colloquially referred to as ''pump and dump'' schemes) are not the types of fraud we believe are likely to occur in Rule 506(c) offerings, given the holding period requirement in Rule 144(d) and other structural impediments, such as restricted transfer legends on stock certificates.

[205] *See* letters from Consumer Federation; Fund Democracy; IDC.

[206] *See* Andrew Patton, Tarun Ramadorai and Michael Streatfield, *Change You Can Believe In? Hedge Fund Data Revisions* (Duke University, Working Paper, 2013). *But see* letter from MFA (June 20, 2013) (questioning the reliability of the underlying data used in the study).

[207] *See* George Aragon and Vikram Nanda, *Strategic Delays and Clustering in Hedge Fund Reported Returns* (Arizona State University, Working Paper, 2013).

[208] *See* Vikas Agarwal, Naveen Daniel and Naranyan Naik, *Do Hedge Funds Manage Their Reported Returns?,* 24 Review of Financial Studies 3282 (2011).

[209] *See Implications of the Growth of Hedge Funds, Staff Report to the U.S. Securities and Exchange Commission* (Sept. 2003), *available at http://www.sec.gov/news/studies/hedgefunds0903.pdf.*

[210] *See* Vladimir Atanasov, Vladimir Ivanov and Kate Litvak, *Does Reputation Limit Opportunistic Behavior in the VC Industry? Evidence From Litigation Against VCs,* 67 Journal of Finance 2215 (2012).

[211] *See* Tracy Wang, Andrew Winton and Xiaoyun Yu, *Corporate Fraud and Business Conditions: Evidence from IPOs,* 65 Journal of Finance 2255 (2010).

[212] Broker-dealers registered with FINRA are required to file private placement memoranda under FINRA Rules 5122 and 5123 for their or their client's private offering. Sections 203 and 204 of the Advisers Act [15 U.S.C. 80b–3 and 80b–4] authorize the Commission to collect the information required by Form ADV. Investment advisers that are required to register with the Commission and exempt reporting advisers are required to file Form ADV with the Commission. The form includes disclosure of Regulation D offerings that they conduct for their client issuers.

not involve a registered investment adviser or broker-dealer.[213]

Form D and Form ADV reconciliation. Our estimate of Form D filing compliance among Commission-registered investment advisers that manage private funds is based on their requirement to report to the Commission on Form ADV the Regulation D offerings that they conduct. We matched the Form D file numbers reported on Form ADV filings from 2012 to the actual Form D and Form D amendments filed on EDGAR. This created a universe of 18,276 private funds identified on Form ADV filings for the period between 2002 and 2012.[214] The matching was done in two steps. First, we matched the file number of each Regulation D offering as reported by the investment adviser on Form ADV to the file numbers in EDGAR.[215] Second, if there was no file number for the Regulation D offering, we matched by private fund name. We compared the name of the private fund reported by the investment adviser in its Form ADV to the issuer names in the Form D and Form D amendment filings. Conducting both steps resulted in an 89% match—i.e., during the period from 2002 to 2012, as many as 11% of the private funds advised by registered investment advisers did not file a Form D when relying on the Regulation D exemption. This number, however, could overstate the actual number of private funds that did not file a Form D due to typographical errors in the name of the private fund or filing number. Also, registered investment advisers are required to identify Form D filing numbers only for private funds that are currently offering their securities. As a result, the Form ADV filings of advisers to private funds that are closed to new investments or are no longer engaged in a Regulation D offering of their securities are not required to disclose a Form D filing number.

Form D and FINRA filing reconciliation. Our estimate of Form D filing compliance among registered broker-dealers that facilitate private offerings is based on their compliance with FINRA Rules 5122 and 5123 (the latter rule took effect on December 3, 2012), which requires member firms that sell securities in certain private offerings to file with FINRA copies of any private placement memorandum, term sheet or other offering document used in these offerings (or amendments thereof) or, alternatively, to file a notice stating that no such offering document was used.[216] As of December 31, 2012, FINRA oversaw nearly 4,300 brokerage firms.[217] During the period from December 3, 2012 to February 5, 2013, FINRA received 366 filings under this rule. Each private offering could have multiple broker-dealers and consequently the 366 filings could represent fewer than 366 unique offerings. Further, FINRA rules require filing by broker-dealers associated with a Regulation D or other private offerings, not all of which require the filing of Form D. A Form D filing is only required by issuers that undertake Regulation D offerings. We cannot identify how many of the 366 filings are related to non-Regulation D offerings.

We matched these FINRA filings to the Form D and Form D amendment filings received on EDGAR. The matching was done in multiple steps. First, we matched using the issuer CIK number and the Form D filing number[218] contained in each of the separate filings. Then, for each unmatched FINRA filing, we searched the issuer name, and variants of the name, in EDGAR to determine if a Form D was filed for that issuer's offering. Applying both procedures resulted in a 91% match—i.e., during this three-month period, subject to the limitations described above, as many as 9% of the offerings represented in the FINRA filings for Regulation D or other private offerings that used a registered broker did not have a corresponding Form D.

b. Legends and Other Disclosures in Regulation D Offering Materials

Prior to the effectiveness of Rule 506(c), general solicitation has not been permitted for private offerings under Rule 506. Although advertising by issuers is prohibited, issuers may provide some material or information to intermediaries and interested investors regarding themselves and their offering. Because this information is not filed with the Commission, we do not know if legends and relevant disclosures are included in any such material.

C. Analysis of the Amendments Relating to Form D

We are proposing amendments to Form D and Regulation D as they relate to Form D in order to enhance our understanding of the Rule 506 market, particularly the impact of the adoption of Rule 506(c). These proposed amendments would:

- Require the filing of Form D 15 calendar days in advance of the first use of general solicitation in a Rule 506(c) offering;
- require the filing of a closing amendment to Form D within 30 calendar days after the termination of a Rule 506 offering;
- require issuers to provide additional information in Form D primarily with respect to Rule 506 offerings; and
- disqualify an issuer from relying on Rule 506 for future offerings until one year after the required Form D filings are made if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with Form D filing requirements in a Rule 506 offering.

The proposals relating to the Form D filing requirements are intended to improve the availability of Form D information to the Commission that would enable it to evaluate market developments in the Rule 506 market. The amendments to the information requirements of Form D would enable the Commission to obtain more complete information about the Rule 506 market than it has now, especially with respect to the composition of investors and the general solicitation practices and verification methods employed in Rule 506(c) offerings.

1. Advance Filing of Form D for Rule 506(c) Offerings

We are proposing to amend Rule 503 of Regulation D to require issuers that intend to engage in general solicitation for Rule 506(c) offerings to file an initial Form D with certain information 15 calendar days in advance of any general solicitation for the offering. We believe that requiring issuers to file an Advance Form D would assist the Commission's efforts to evaluate the use of Rule 506(c). The Advance Form D would be useful to the Commission and the Commission staff, as it would enhance the

[213] Approximately 20% of Rule 506 offerings use either a broker-dealer or investment adviser.

[214] We chose this period because Form D file numbers are not available for Form D filings submitted prior to January 1, 2002.

[215] Some advisers identify a private fund's Form D file number as a series of 9s because they may not be able to locate the fund's Form D file number (particularly with respect to Form D filings made prior to January 1, 2002 because such file numbers are not available through an EDGAR search). Advisers may also mask the Form D file number to maintain the anonymity of a private fund's name. These factors will understate the number of funds that file Form D and Form D amendments. Thus, in such cases we attempted to match by fund name.

[216] Not all broker-dealers that sell securities in private offerings have to file private placement memoranda with FINRA under FINRA Rules 5122 and 5123. FINRA filings represent a small proportion of Regulation D offerings. For example, if a broker-dealer is not registered as a member of FINRA, they will not file with FINRA. Further only those private offerings that have retail investors, *i.e.,* natural persons, trigger the requirement for the broker-dealer to file the private placement memorandum with FINRA.

[217] See *http://www.finra.org/Newsroom/Statistics/.*

[218] The Form D filing number is the 021—Commission filing number reported in the header of the Form D filing.

information available to the Commission to analyze issuers that attempted to conduct Rule 506(c) offerings but were unsuccessful in selling any securities through these offerings or chose alternative forms of raising capital. Currently, Form D is required to be filed only after the first sale of securities, which means that issuers that attempted to, but did not, complete a sale are not required to file a Form D, thereby limiting the Commission's ability to determine which issuers are facing challenges raising capital under Rule 506(c) and whether further steps are needed to facilitate issuers' ability to raise capital under Rule 506(c). We also understand that the Advance Form D would be useful to state securities regulators and to investors in gathering timely information about the use of Rule 506(c).

On the other hand, to the extent that an Advance Form D filing signals planned capital-raising activity and related details to potential competitors, some issuers may be reluctant to use Rule 506(c) when they might otherwise. The proposed Advance Form D filing requirement could thus deter some issuers from using Rule 506(c) as they would be forced to indicate their capital raising plans to a limited extent prior to commencing their general solicitation activities. In addition, the proposed Advance Form D filing requirement could impose market timing costs to the extent that an issuer would like to move quickly but has not yet filed an Advance Form D. We have proposed an advance filing deadline that we think appropriately balances the benefits of advance notice with these market timing costs. Nevertheless, many issuers may choose to file an Advance Form D just in case they decide to conduct a Rule 506(c) offering. As a result, many Advance Form D filings may not reflect the true intent of issuers to conduct these offerings. If there are large numbers of issuers that frequently engage in this practice, there could be a sizable number of premature, and possibly even meaningless, notices of Rule 506(c) offerings; however, requiring specific information about the anticipated offering could decrease the likelihood that issuers file an Advance Form D when they do not intend to conduct an offering in the near term.

To complete an Advance Form D would cause issuers to incur costs; however, because the information in Advance Form D mirrors the information required to be filed within 15 days of the first sale of securities, the additional expense to collect the information for the Advance Form D would be offset by the lack of any need to do so for the subsequent filings.

2. Form D Closing Amendment for Rule 506 Offerings

We are also proposing to amend Rule 503 to require the filing of a final amendment to Form D within 30 calendar days after the termination of a Rule 506 offering. Requiring a closing filing through a Form D amendment upon the termination of a Rule 506 offering, in combination with the changes to Form D to require additional information on Rule 506 offerings, would provide more complete information of the total amounts of capital raised in these offerings by the types of investor and the methods used to verify accredited investor status in Rule 506(c) offerings.

At present, issuers are required to file a Form D within 15 days of the first sale of securities in a Regulation D offering and amendments to the Form D under certain circumstances. As a result, if the total offering amount remains the same or is increased by less than 10%, any capital raised or any change in the composition of subscribing investors, subsequent to the last filing for the offering, is not required to be reported in a Form D. For example, in 2010, issuers sought to raise $1.2 trillion in reported Regulation D offerings, but only $905 billion was reported as sold at the time of the initial Form D filing.[219] Thus, based on the available information, we are not able to determine the actual amount raised. A requirement to file a closing amendment to Form D for a Rule 506 offering that confirms the actual amount raised in the offering could provide more complete information.

Without a closing Form D amendment requirement, it may be difficult to clearly ascertain, for example, all of the methods of general solicitation that issuers used in Rule 506(c) offerings or the types of investors solicited in these offerings, particularly if any changes in solicitation methods or targeted investors after the initial Form D filing are not otherwise required to be reported. In such case, any analysis of the information in Form D filings would be based on incomplete data, which may limit the intended benefits of collecting the Form D information. Updated and more conclusive data on Rule 506 offerings from closing Form D amendments would provide the Commission with a more complete account of the flow of capital in the Rule 506 market, how the flow relates to offering characteristics and the potential associated risks and would assist the Commission in evaluating whether further regulatory action is necessary.

Requiring a closing Form D amendment for Rule 506 offerings would likely come at a nominal cost to issuers in terms of filing another notice, particularly because the filing would be substantially similar to the initial Form D filing or prior Form D amendments for the offering.

3. Amendments to the Content Requirements of Form D

The information about Regulation D offerings collected to date and described in this release illustrates and underscores the importance of the non-registered offering market to the U.S. economy. Form D is the primary source of information for the Commission to assess the Regulation D market. Much of what we know about the size and characteristics of the private offering market comes from Form D filings. The continued collection of this information following the elimination of the prohibition against general solicitation in Rule 506(c) offerings will be an important tool for determining the ongoing impact of Rule 506(c).

A number of the proposed amendments to Form D would require additional information specific to Rule 506(c) offerings, which would enable the Commission to develop a greater understanding of the new Rule 506(c) market, particularly with respect to those matters where limited to no information would otherwise be available. Other proposed revisions to Form D would require additional information in regard to both Rule 506(b) offerings and Rule 506(c) offerings, which would permit a more complete analysis and comparison of the use of current Rule 506(b) and new Rule 506(c).[220] Without a substantially similar set of information collected for both Rule 506(b) and 506(c) offerings, the effects of the use of general solicitation on the Rule 506 market may be difficult to measure or identify. Increased consistency in the reporting of information in Form D filings for offerings under Rules 506(b) and 506(c) would promote the availability of comparable data for the two types of offerings and, consequently, may result in a more complete assessment of the

[219] *See* Ivanov/Bauguess Study. For issuers that reported their offering amount as 'Indefinite', we assumed that amount offered is equal to amount raised.

[220] A number of the proposed revisions to Form D would also require additional information in regard to offerings under Rule 504, Rule 505, and Section 4(a)(5).

effects of the elimination of the prohibition against general solicitation on raising capital under Regulation D. In addition, because the overwhelming majority of Regulation D offerings are conducted in reliance on Rule 506, this should provide the Commission with substantially more complete information about the Regulation D market generally, which, when considered along with the information collected as part of the Commission's Rule 506 review program, would help the Commission evaluate the need for additional action to enhance investor protection.

On the other hand, the proposed amendments to Form D may result in higher compliance costs for issuers conducting offerings in reliance on Rule 506(b) and new Rule 506(c). Issuers relying on Rule 506(b) would have to provide more information than is currently the case in regard to Form D, which would be coupled with the risk of disqualification from using Rule 506 in future offerings, under proposed Rule 507(b), if they or their affiliates or predecessors fail to comply with the additional Form D filing requirements. Nevertheless, we believe that the additional burden to provide the additional required information to be minimal. The proposed amendments would also require, depending on the circumstances, additional information under Items 5 and 9 of Form D with respect to offerings under Rule 504, Rule 505 or Section 4(a)(5), which, as discussed below, we do not believe would result in materially higher compliance costs for issuers conducting these offerings.

Issuers may view the increased reporting requirements as a greater regulatory burden and a loss of commercial privacy,[221] which could put certain issuers at a competitive disadvantage if the costs are sufficient to deter them from raising capital in the private offering market. Requiring issuers to report more information in Form D could also result in some issuers choosing to consider other capital-raising options.

A discussion of a number of the proposed amendments to Form D is set forth below.

a. Investor Types

The proposed amendment to Item 14 (Investors) of Form D would require information, with respect to Rule 506 offerings, on the number of investors under the following categories: natural persons who are accredited investors, legal entities that are accredited investors, and if applicable, non-accredited natural persons and non-accredited legal entities. The additional required information would include the amount raised from each of the four categories of investors. At present, Form D requires information on the total amount of capital expected to be raised and the number of accredited and non-accredited investors that have purchased securities in a particular offering. We do not have information on the number of investors who are natural persons or legal entities, or the amounts raised from each of these investor categories. The proposed amendment would thus require more detailed information on the composition of investors in the Rule 506 market than is currently available. Because all purchasers in Rule 506(c) offerings must be accredited investors, and offerings under Rule 506(b) can have no more than 35 non-accredited investors who meet certain sophistication requirements, disaggregated data regarding the number of each type of investor and the amount invested by accredited and non-accredited investors would provide a more complete view of their participation in the Rule 506 market.

Understanding the composition of investors in Rule 506 offerings as between natural persons and legal entities would also be important for risk assessment purposes. Institutional investors usually have a greater amount of resources at their disposal and therefore are more likely to have better information and greater sophistication when considering the potential risks and benefits of a particular investment, as compared to natural persons.[222] To the extent that natural persons are less sophisticated and more prone to be targets of fraud than institutional investors, understanding how many natural persons are participating in Rule 506(c) offering could help identify those Rule 506(c) offerings that raise greater investor protection concerns. This information could also help the Commission better understand how general solicitation is used with respect to the types of investors. Additionally, concerns about verification methods to assess accredited investor status are greatest as it relates to natural persons. Having a better understanding of the involvement of natural persons in Rule 506(c) offerings would assist the Commission in its assessment of the efficacy of the verification provisions.

Issuers relying on Rule 506(c) will be collecting such information as part of their verification of accredited investor status for Rule 506(c) offerings. We do not expect the requirement that issuers report this information on Form D to impose significant additional costs.

b. Issuer Size

The proposed amendment to Item 5 (Issuer Size) of Form D would replace the ''Decline to Disclose'' option with ''Not Available to Public'' option. This change to Form D would assist the Commission in obtaining a greater amount of information on the size of issuers that conduct Rule 506 offerings. This proposed amendment would also apply to offerings under Rule 504, Rule 505 and Section 4(a)(5). At present, a majority of Form D filings do not provide information on the size of the issuer's revenue (if the issuer is an operating company) or net asset value (if the issuer is a hedge fund or other investment fund). It is likely that some issuers keep this information private for competitive purposes and therefore do not make this information widely available. For those issuers that already make this information publicly available, or that do not currently make a reasonable effort to keep such information confidential, reporting their size range in a Form D filing would not impose a material cost. Having this information would provide a more complete picture of the Rule 506 market and allow the Commission to more accurately assess the impact of allowing general solicitation on capital formation across issuer sizes. This information would be particularly useful in better understanding the effects of general solicitation on capital formation by small businesses, a set of issuers that otherwise face significantly greater challenges than larger issuers in finding investors.

c. Issuer Industry Group

Industry information is an important issuer characteristic that helps in assessing the effectiveness of private markets in promoting capital formation across industry groups. An analysis of Form D filings over the period 2009–2012 indicates that the ''Other'' category was checked in over 15% of offerings.[223] The proposed amendment to Item 4 (Industry Group) would require an explanation to be provided when an issuer checks ''Other'' as its industry. This would allow a better assessment of the representation of a

[221] Issuers may not wish to reveal certain information such as the timing of amounts offered and raised, including whether an offering was successfully completed, which could inform other market participants, including competitors, about the issuers' ability to finance investments.

[222] *See* note 198.

[223] See Ivanov/Bauguess Study.

particular industry or sub-industry in Regulation D offerings and help the Commission evaluate whether industry classifications are appropriately defined in Form D.

d. Control Persons

The proposed amendment to Item 3 (Related Persons) to include controlling persons when the issuer seeks to use general solicitation in a Rule 506(c) offering will expand the set of persons covered under the existing list of related persons that includes promoters, directors and executive officers. Thus, a beneficial owner who has a significant equity stake in an issuer but may not be a managing executive would now need to be identified. This information may be helpful to the Commission in developing a more comprehensive understanding of the issuers and other market participants that are involved in Rule 506(c) offerings.

Including information regarding control persons would enable investors to better identify persons who may be in positions to influence the Rule 506(c) offering. The identity information could also be useful if questions arise about the offering. Issuers would incur additional reporting costs when there are control persons that are not also related persons. In many instances this information is readily available and easy to collect, particularly to the extent that issuers identify controlling shareholders under the bad actor provisions we are adopting today. Issuers could, however, find this amendment burdensome as they may want to keep information on controlling persons private.

There could be instances where some shareholders who own a significant stake in the issuers' equity but are passive owners are incorrectly identified as control persons in a publicly filed form. Because this information would be required only for Rule 506(c) offerings, issuers would not face these privacy concerns if they do not rely on Rule 506(c) for their offering.

e. Trading Venue and Security Identifiers

Proposed Item 18 would require issuers to identify if any of its securities are traded on a national securities exchange, ATS or any other organized trading venue. If the issuer answers in the affirmative, it is required to identify the names of such trading venues where its securities are being traded and the SEC file number for such class of securities. The issuer, under proposed Item 18, would also need to identify if the securities to be sold in the offering are of the same class as the class of securities listed or quoted on the trading venue. Further, the proposed amendment to Item 9 (Types of Securities Offered) of Form D would require information on the trading symbol and security identifier, such as a CUSIP number [224] or ISIN (International Securities Identification Number), for the offered securities, if any.

These proposed amendments would apply to offerings under Rule 506 as well as to offerings under Rule 504, Rule 505 and Section 4(a)(5). In many cases, the class of an issuer's security offered through a Rule 506 offering may not be eligible for trading on a national securities exchange, ATS or any other organized trading venue, and may not have an assigned security identifier.

For classes of securities where this information is available, regulators could link the offered securities to financial information about the issuer and the class of security—such as accounting data and security-price data—that is not available on Form D but is available through common third-party data aggregation platforms and through the associated trading venues. The inclusion of a security identifier in Form D would be relevant information for a number of private offerings. For example, analysis of Form D filings shows that approximately 10% of Exchange Act reporting companies conducted Regulation D offerings during the period between 2009 to 2011.[225]

The inclusion of this information could be useful to the Commission in evaluating developments in the Rule 506 market in several ways. First, with respect to a security identifier, linking Rule 506 offerings and financial information about the issuer from other financial data providers would allow for a more effective evaluation of one part of the Rule 506 market. In particular, the availability of a security identifier would enable us to automatically match and process financial and other information about the issuer in a manner that would be significantly less burdensome than if we had to rely solely on a firm name and other identifying information. Security identifiers also could facilitate tracking multiple issuances by the same issuer, which might not otherwise be clear if a security identifier exists but is not made available. In addition, identifying the trading venue for an offered security could help us assess whether particular trading venues—or the lack of trading venue—is associated with higher prevalence of fraud and other illegal activities.

Identifying whether the securities being offered in reliance on Rule 506 are of the same class of securities, or are convertible into, or exercisable, or exchangeable for such class of securities will provide additional informational linkages between publicly available data and private offerings. The marginal cost to issuers of providing this information is likely to be low because this information should be readily available to the issuers of the offered securities.

f. Use of Proceeds

The proposed amendment to Item 16 (Use of Proceeds) of Form D would require issuers that are not pooled investment funds to report information on the portion of proceeds (if any) from Rule 506 offerings that will be used to repurchase or retire the issuer's existing securities. This information would allow the Commission to distinguish between offerings that raise capital to allow insiders and/or incumbent shareholders a partial or full exit and offerings that use the proceeds for investments or capital expenditures. This information could help us better distinguish the impact of the ability to use general solicitation in Rule 506(c) offerings on capital formation versus investment exit strategies, particularly for small businesses. It may also help inform investors and the market generally about the issuer's incentives or related risks. For example, proceeds used towards redemption of securities could indicate that existing shareholders are lowering their investment exposure in the issuer.

The proposed amendment also requires issuers, other than pooled investment funds, that are relying on Rule 506 to provide more information on the use of offering proceeds. Issuers will be required to indicate what part of the proceeds is being used to pay for offering expenses, asset acquisition, working capital, business acquisition or repayment of existing debts. For non-fund issuers, this information would help us evaluate whether and how Rule 506 enhances capital formation that would be used for new investments, consistent with the intent of the JOBS Act, as compared to refinancing and capital restructuring. However, the

[224] CUSIP (Committee on Uniform Securities Identification Procedures) is a universally recognized identification for more than 9 million unique financial instruments. The CUSIP system, owned by the American Bankers Association and operated by Standard & Poor's, facilitates the clearing and settlement process of securities. The number consists of nine characters (including letters and numbers) that uniquely identify a company or issuer and the type of security. *See https://www.cusip.com/cusip/index.htm.* CUSIP is one of the most widely available securities identifiers and is available for the securities issued by Exchange Act reporting companies.

[225] Ivanov/Bauguess Study.

additional information may reveal previously non-public information about issuer plans that could put the issuer at a competitive disadvantage. Moreover, an issuer may not be certain as to the ultimate use of proceeds or may alter its intended use as time passes and market conditions change. In these cases, the Form D information may not accurately reflect issuer plans or the issuer may be required to file an amended Form D.

g. Issuer Web Site

The proposed amendment to Item 2 (Principal Place of Business and Contact Information) would require all Regulation D issuers to provide their publicly accessible business Web site, if they have one. Web sites for operating businesses have become ubiquitous and are part of their contact information, and in some instances, businesses could be operating only via the Internet and may not have a physical location. When available, this information would be a useful component of issuer identification and would not be burdensome to provide.

h. Types of General Solicitation Used

The proposed amendments to Form D would include adding a requirement for issuers to provide information on the types of general solicitation used in Rule 506(c) offerings. The options would include oral communications, written communications, such as mass mailings and emails, Web sites or television and the web link to the advertising if the advertising is presented on a Web site. Having this information would help the Commission perform reviews of the Rule 506 market to better understand how the different methods of solicitation correspond to issuer behavior, including potentially fraudulent activity, identified through the Commission's Rule 506 review program.

i. Verification Methods

The proposed amendments to Form D would include adding requirements for issuers to provide information about how the investors in the offerings qualified as accredited investors, such as a natural person on the basis of income or net worth, as well as information on the types of methods used for verifying the accredited investor status of purchasers. This information would help us assess the nature of the verification methods used and how issuers are complying with the requirement to take reasonable steps to verify the accredited investor status of purchasers in Rule 506(c) offerings. The Commission may be able to use this information to analyze whether there are correlations between certain verification methods and the incidence of fraud in the private offering market. Similarly, information about verification practices learned through the Commission's Rule 506 review program could be applied to subsequent Commission reviews of any practices, or combinations of practices and other offering characteristics, associated with the increased likelihood of fraudulent activity.

4. Proposed Amendment to Rule 507

The proposed amendment to Rule 507 would disqualify an issuer from using Rule 506 for future offerings if the issuer, or its predecessors or affiliates, had conducted an offering under Rule 506 in which, within the last five years, it or they did not comply with the Form D filing requirements of Rule 503 in Rule 506 offerings. Disqualification would extend for a period of one year after the filing of all required Forms D and Form D amendments have been made. This provision should increase the incentive for issuers to submit timely filings of Form D.

As described above, we could not locate Form D filings for approximately 10% of Regulation D offerings where broker-dealers or registered investment advisers were involved.[226] Although we cannot estimate the rate of compliance among the issuers of the remaining 89% of Rule 506 offerings that do not use a registered investment adviser or broker-dealer, it may be reasonable to assume that they are no more likely to file a Form D, particularly to the extent that they undertake an offering without the assistance of a regulated entity. This evidence suggests that many private issuers are failing to file a Form D even though this is a requirement under Regulation D. By disqualifying an issuer from relying on the Rule 506 exemption for one year for future offerings when the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with Form D filing requirements in a Rule 506 offering, the Commission intends to increase the incentive for issuers to comply with the Form D filing requirements.

Greater compliance with Form D filing requirements would provide a more complete picture of the Regulation D market. It would enhance the Commission's ability to assess the effectiveness and efficiency of the private offering market and the impact of the elimination of the prohibition against general solicitation. As the Commission obtains more comprehensive data on Regulation D offerings, it would be able to better evaluate activity in Rule 506(b) and Rule 506(c) markets and undertake regulatory action in a more informed manner. In particular, to the extent that certain issuer and offering characteristics collected through Form D are associated with illegal market practices, regulators would be in a better position to focus monitoring efforts on offerings that present heightened investor protection concerns.

A better-informed view of capital-raising in the Rule 506 market could help the Commission engage in targeted regulatory responses to the potential for fraudulent activity in the Rule 506 market. To the extent that these regulatory responses decrease fraudulent activity, they could promote investor protection and investor interests potentially leading to higher participation by eligible investors, especially natural persons who are accredited investors, and to greater capital-raising opportunities.

While the proposed disqualification provision is designed to encourage a higher rate of compliance with the Form D filing requirements, it would make failure to file costly to Rule 506 issuers if they or their successors and affiliates cannot rely on Rule 506 in a timely manner for future offerings and they would otherwise do so. The loss of access to Rule 506 offerings could impair their competitiveness if they are unable to secure alternative sources of capital at the same cost.

For those issuers that submit their Form D filings in a timely manner, the potential for disqualification under proposed Rule 507 would pose little additional risk, such as from an accidental failure to file a Form D or the late filing of a Form D that was not identified and corrected during the cure period. Those issuers that, in the past, have chosen not to file a Form D or filed it late may have a stronger incentive to file (*i.e.,* the risk of losing the ability to conduct a Rule 506 offerings in the future may outweigh the cost of giving their competitors better access to certain capital-raising information). To the extent that these issuers otherwise engage in legitimate capital raising activities, the cost of conditioning the future use of Rule 506 on Form D filings could be disproportionate to the benefit of having a public notice of their offering.

We are not proposing to disqualify an issuer from reliance on Rule 506 in its

[226] This evidence was based on 11 years of Form ADV filings by registered investment advisers, and three months of data at the beginning of 2012 for broker-dealers filing offering documents with FINRA.

current offering for failure to file a Form D for such offering; an issuer that does not comply with the filing requirements will therefore not be subject to immediate costs, such as the loss of an offering exemption and potential rescission rights of investors. Disqualification for future offerings only would provide a less severe consequence for inadvertent missed filings and late filings, and would limit the potential costs to more active issuers of securities in private markets. In this regard, repeat issuers in Rule 506 offerings would be more affected by the disqualification provision but would be more likely to understand the Rule 503 filing requirements.

The inclusion of a cure period and providing the disqualification to be lifted for one-year after the required Form D filings have been made or by virtue of a waiver by the Commission, would help moderate issuers' costs of non-compliance in Form D filings. At the same time, making issuers that repeatedly fail to file Form D ineligible for a cure period will provide a strong incentive for timely compliance with the filing requirements. This would increase the cost associated with non-compliance, although issuers that have been disqualified from future use of Rule 506 would retain the option of applying for a waiver. We believe that disqualifying an issuer from relying on Rule 506 for one year may be a sufficient incentive for achieving higher filing compliance, and is not so severe that it would deter issuers from using Rule 506 for their capital-raising activity.

D. Analysis of the Proposed Rule and Rule Amendments Relating to General Solicitation Materials

We are proposing a new rule under Regulation D and an amendment to a Securities Act rule in connection with an issuer's ability to engage in general solicitation in Rule 506(c) offerings.

1. Mandated Legends and Other Disclosures for Written Solicitation Materials

We are proposing new Rule 509 of Regulation D to require issuers to include legends in all written general solicitation materials used in a Rule 506(c) offering and to require private funds to include an additional legend and other disclosures where the written general solicitation materials include performance data. Specifically, issuers would be required to include:

- Eligibility legends that advise investors that securities offered under Rule 506(c) may be purchased only by accredited investors.
- Risk legends that advise investors of the following: the securities are being offered in reliance on an exemption from the registration requirements of the Securities Act and are not required to comply with specific disclosure requirements under the Securities Act; the Commission has not passed upon the merits of or given its approval to the securities, the terms of the offering, or the accuracy or completeness of any offering materials; the securities are subject to legal restrictions on transfer and resale and investors should not assume they will be able to resell their securities; and investing in securities involves risk and purchasers should be able to bear the loss of the entire investment. Private funds would be required to include a legend informing investors that the funds are not subject to the protections of the Investment Company Act.
- Performance disclosures in the case of private funds informing investors that the performance data represents past performance, that past performance is not indicative of future results, that the current performance may be lower or higher than the performance presented, that performance data is not calculated on a standardized basis as is required for registered funds, and that the performance of the private fund may not be directly comparable to the performance of other funds. Private funds also would be required to include only performance data as of the most recent practicable date and to include a telephone number or Web site where an investor may obtain current performance data. Private funds also would be required to disclose the period for which performance is presented and if performance data does not reflect the deduction of fees and expenses, private funds would be required to disclose that fees and expenses have not been deducted and that if such fees and expenses had been deducted, performance may be lower than presented.

The inclusion of mandated legends would better inform potential investors as to whether they are qualified to purchase in Rule 506(c) offerings. Including risk and performance legends could make investors more aware of the potential risks associated with such offerings and, with respect to offerings by private funds, could help investors avoid confusing private funds with registered funds, which have a different risk and regulatory profile. Performance disclosures for private funds would also assist potential investors in assessing performance claims that may be included in the general solicitation materials. These legends would alert potential investors to certain investment risks.

Even though only accredited investors are allowed to purchase in Rule 506(c) offerings, advertising and other activities by issuers and intermediaries could induce non-accredited investors to believe that they are eligible to participate in these investment opportunities. Legends notifying them that only accredited investors are eligible to invest in these offerings could help alert non-accredited investors as to their ineligibility to participate.

We anticipate that the cost of including such legends in sales materials would be minimal for issuers. In some instances, the legends may be of limited benefit to investors because legends do not address whether the offering is fraudulent. It is possible that some unsuspecting accredited investors might erroneously believe that the inclusion of legends validates all of the information and risks regarding the offering. Further, it is possible that because these legends may contain standardized language, investors might discount the relevance of these legends.

Requiring additional disclosures for private funds, similar to those required by Rule 482 under the Securities Act for registered investment companies, would increase the likelihood that the performance data that is reported in the written general solicitation material is timely and would provide additional information and context about the performance presented. Because there are no standardized performance reporting requirements for private funds, such disclosure would address some concerns about investors being misled or confused in interpreting the performance information and may decrease the likelihood of misleading or exaggerated performance information being presented in private fund written general solicitation materials. While flexibility in reporting performance data may be appropriate for private funds that have a varied scope of investment strategies, performance calculation methodologies that are non-standardized or complicated limit how much investors can appropriately glean from the data advertised in the written material. The purpose for requiring these additional disclosures is to provide context so investors can better understand fund performance information.

The proposed requirement for private funds to include a telephone number or Web site where an investor may obtain current performance data could impose costs, including the cost of establishing a telephone line or establishing a Web site for this information. We have attempted to address these costs by providing flexibility to distribute the information either through a telephone number or a Web site. We have also determined to not require that the telephone number be toll-free or collect. We believe that most private funds (or their advisers) currently maintain either a telephone number or Web site, though we recognize that some private funds or their advisers may incur additional costs for staff and technology. The current information that a private fund would be required to provide would only need to be as of the most recent practicable date. Because this requirement would not require a private fund to calculate performance for dates on which the fund would not otherwise be calculating performance, we believe this will limit the costs incurred by private funds. In addition, updated current performance would be provided as of the last date on which the private fund determined the valuation of its portfolio securities. We do not expect a private fund to value its portfolio solely for the purpose of providing updated current performance under proposed Rule 509, which would not increase costs.

2. Proposed Amendments to Rule 156

Rule 156 under the Securities Act is an interpretive rule that provides guidance on the types of information in investment company sales literature that could be misleading for purposes of the federal securities laws, including Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b–5 thereunder. We are proposing amendments to Rule 156 to apply the guidance contained in the rule to sales literature used by private funds. The sales literature and other offering materials used by private funds are already subject to the antifraud provisions of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b–5. The proposed amendments to Rule 156 are intended to provide helpful guidance to private fund issuers in developing sales literature that is neither fraudulent nor misleading. The proposal may also encourage private funds to include additional disclosure regarding performance and other statements or representations about the characteristics of the fund. Funds may incur some costs in reviewing their sales literature for consistency with the interpretive guidance set forth in Rule 156. We note, however, that private funds should already be reviewing their sales literature for misleading statements to avoid violating the antifraud provisions of the federal securities laws. Accordingly, we believe that the amendments to Rule 156 would not impose significant compliance costs on private funds.

3. Request for Comment on Manner and Content Restrictions for Private Funds

Commenters have suggested that there be standards or requirements that would govern the content and/or manner of general solicitations by private funds in Rule 506(c) offerings. As discussed above, there may be investor protection concerns with respect to the offering materials used by private funds as these funds are not subject to specific disclosure requirements in reporting their performance, unlike registered funds. Some commenters have advocated that, in order to engage in general solicitation, the materials used by private funds should be held to standards that are analogous to those that are applicable to the materials used by mutual funds. They have also advocated for restricting the use of performance data in general solicitation materials by private funds until the Commission can develop standardized performance calculation and reporting requirements. We recognize, however, that prescribing performance standards in general solicitation materials could reduce the flexibility of issuers when methodologies for calculating performance may vary for legitimate reasons, including investor preferences, and could be burdensome for issuers, especially if their general solicitation materials are otherwise not misleading.

E. Analysis of Temporary Rule Relating to Mandatory Submission of Written General Solicitation Materials

Proposed new Rule 510T in Regulation D would require an issuer conducting a Rule 506(c) offering to submit to the Commission any written general solicitation materials prepared by or on behalf of the issuer and used in connection with the Rule 506(c) offering. This requirement would enable the Commission to evaluate the use of written general solicitation materials. It could also serve as a deterrent against potential forms of misleading advertising or other fraud because the written general solicitation materials would be submitted to the Commission and accessible to other securities regulators. Having access to the written general solicitation material could help regulators evaluate market practices.

The written general solicitation material would not be treated as filed or furnished with the Commission and is therefore not subject to the particular liability provisions under the Securities Act or the Exchange Act for filings. Conditioning the future availability of Rule 506 on not being subject to any order, judgment or court decree for failure to comply with proposed Rule 510T would provide incentives for submitting written general solicitation material. Inclusion of a two-year sunset period for this rule would provide a finite period of time (and information) for issuers to submit written general solicitation materials for the Commission's consideration in assessing general solicitation in Rule 506(c) offerings and would therefore also limit issuers' costs of compliance.

Under the proposed rule, written general solicitation materials would be required to be submitted no later than the date of first use of such materials. Issuers are required to submit only written general solicitation materials, so to the extent issuers' written general solicitation materials do not change, they should not be costly to submit. If the written general solicitation materials change or are updated during the course of an offering, however, submission of these materials at multiple times could create an increased burden for issuers.

F. Analysis of Potential Impacts on Efficiency, Competition and Capital Formation

The proposed amendments to the Form D filing requirements would enable the Commission to evaluate the effectiveness of Regulation D market more systematically and to more accurately determine the economic impact of eliminating the prohibition against general solicitation in Rule 506 offerings. A more complete understanding of how and where capital is being raised in offerings relying on Rule 506(b) or Rule 506(c) would help the Commission better assess the risk in these markets and evaluate the effectiveness of the use of general solicitation materials in capital-raising activity. Appropriate and timely regulatory responses to Rule 506 market developments would enhance investor protection, and could encourage greater investor participation in the Rule 506 markets, which would lead to higher aggregate of capital formation.[227]

The proposed amendments to the Form D filing requirements would also provide the Commission, other regulators and investors with more information about market participants and practices in the private offering market. The increased quantity and quality of information about private offerings is designed to make it easier

[227] *See, e.g.,* Andrei Shleifer and Daniel Wolfenzon, *Investor Protection and Equity Markets,* 66 Journal of Financial Economics 3 (2002).

for regulators to identify poor or inappropriate market practices, which may help deter fraudulent activity. A better understood and regulated market would promote investor protection and contribute to broader participation by accredited investors.

The inclusion of legends and additional disclosures would inform investors about the differences between Rule 506(c) offerings and registered offerings, allowing for greater transparency and better understanding of the differences in the underlying risks of the two types of offerings. This would improve investor decision-making and thereby, the allocative efficiency of capital in the Rule 506 market. The proposed amendments to Securities Act Rule 156 may also make private funds and their investment advisers more aware of potentially misleading statements in their sales literature and written general solicitation material.

The elimination of the prohibition against general solicitation may enhance the ability of accredited investors to identify and evaluate investment opportunities in private funds that would not have previously been available. This could increase the level of competition between private funds and registered funds and result in a shift in the flow of invested capital from registered to private funds. The proposed amendments to require legends and disclosures in written general solicitation materials are intended to limit such a shift to only those investors that are qualified to participate in Rule 506(c) offerings. We are not, however, able to quantify the magnitude of such a potential substitution of investment in private funds and registered funds or the extent to which the proposed legends will affect that shift.

We recognize the proposed rule and form amendments in this release could increase the regulatory burden for issuers in the Rule 506(b) and Rule 506(c) markets, which could drive potential issuers, especially small issuers, to the Rule 504 and Rule 505 markets. Some issuers may even find accessing public markets more attractive. However, with the availability of general solicitation in Rule 506(c) offerings, the benefits of using Rule 506(c) are still likely to justify the higher costs of complying with the proposed rule and form amendments.

X. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''),[228] the Commission must advise the OMB as to whether a proposed regulation constitutes a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment or innovation.

If a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review.

We request comment on whether our proposed amendments would be a ''major rule'' for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- any potential increase in costs or prices for consumers or individual industries; and
- any potential effect on competition, investment or innovation.

We request those submitting comments to provide empirical data and other factual support for their views to the extent possible.

XI. Initial Regulatory Flexibility Analysis

The Commission has prepared this Initial Regulatory Flexibility Analysis in accordance with Section 603 of the Regulatory Flexibility Act.[229] This Initial Regulatory Flexibility Analysis relates to the amendments to Regulation D and Form D and Rule 156 that we are proposing in this release.

A. Reasons for, and Objectives of, the Proposed Action

The primary reason for, and objective of, the proposed amendments to Form D and the proposed amendments to Regulation D relating to Form D is to improve the Form D data collection process with respect to offerings under Rule 506 of Regulation D and, in particular, to assist our efforts to assess the use of general solicitation in Rule 506(c) offerings. We believe these amendments, in general, would improve our Form D data collection efforts by providing a greater incentive for issuers to file Form D and by amending the information requirements of Form D to require additional information on Rule 506 offerings. Proposed Rule 509, which would require issuers to include certain legends and other disclosures in written general solicitation materials used in Rule 506(c) offerings, is intended to address investor protection concerns arising from the ability of issuers to engage in general solicitation in these offerings. Proposed Rule 510T, which would require issuers to submit to the Commission any written general solicitation materials used in Rule 506(c) offerings, is intended to facilitate the Commission's understanding of the market practices relating to how issuers solicit potential purchasers through written general solicitation materials for their Rule 506(c) offerings. The proposed amendments to Rule 156 are intended to provide helpful antifraud guidance to those preparing sales literature for private funds.

We are proposing the amendments to Regulation D and Form D under the authority in Sections 4(a)(2), 19(a) and 28 of the Securities Act,[230] as amended, and Section 201(a) of the JOBS Act.[231] We are proposing the amendments to Rule 156 under the authority in Section 19(a) of the Securities Act[232] and Sections 10(b) and 23(a) of the Exchange Act.[233]

B. Small Entities Subject to the Proposed Rule and Form Amendments

For purposes of the Regulatory Flexibility Act, under our rules, an issuer, other than an investment company, is a ''small business'' or ''small organization'' if it has total assets of $5 million or less as of the end of its most recent fiscal year and is engaged or proposing to engage in an offering of securities which does not exceed $5 million.[234] For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[235]

The proposed amendments would apply to all issuers that conduct offerings under Rule 506 and would affect small issuers (including both operating businesses and pooled investment funds that raise capital under Rule 506) relying on this exemption from Securities Act registration. All issuers that sell securities in reliance on Rule 506 are required to file a Form D with the Commission reporting the transaction.

[228] Public Law 104–121, Tit. II, 110 Stat. 857 (1996).

[229] *See* 5 U.S.C. 603.

[230] 15 U.S.C. 77d(a)(2), 77s(a), and 77z–3.

[231] Public Law 112–106, sec. 201(a), 126 Stat. 306, 313 (Apr. 5, 2012).

[232] 15 U.S.C. 77s(a).

[233] 15 U.S.C. 78j(b) and 78w(a).

[234] 17 CFR 230.157.

[235] 17 CFR 270.0–10(a).

For the year ended December 31, 2012, 16,067 issuers made 18,187 new Form D filings, of which 15,208 issuers relied on the Rule 506 exemption. Based on information reported by issuers on Form D, there were 3,958 small issuers [236] relying on the Rule 506 exemption in 2012. This number likely underestimates the actual number of small issuers relying on the Rule 506 exemption, however, because over 50% of issuers declined to report their size. The proposed amendments to Rule 156 would apply to all private funds.

C. Projected Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendments to Regulation D and Form D would impose certain reporting and compliance requirements on issuers that conduct Rule 506 offerings. The proposed amendment to disqualify an issuer from relying on the Rule 506 exemption if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with Form D filing requirements in a Rule 506 offering would not add a new reporting, recordkeeping or other compliance requirement because the filing of Form D is currently a requirement of Regulation D. The proposed amendments to Regulation D to require an Advance Form D filing for Rule 506(c) offerings, a closing Form D amendment for Rule 506 offerings, temporary submission of written general solicitation materials used in Rule 506(c) offerings, prescribed legends and disclosure in written general solicitation materials used in Rule 506(c) offerings, as well as the proposed amendments to Form D to require additional information, would, however, impose additional reporting and compliance requirements on issuers that conduct offerings under Rule 506 and, to a much lesser extent, offerings under Rule 504, Rule 505 and Section 4(a)(5). We expect that small entities would incur additional initial and ongoing costs related to complying with these requirements. Initial costs include those associated with preparing the first Form D filing that includes the required additional information in Form D, preparing legends and disclosures to be included in written general solicitation materials for Rule 506(c) offerings and submitting such materials to the Commission prior to the date of first use. Ongoing costs include the additional costs arising from providing this additional information in each subsequent filing of a Form D or Form D amendment when required, including the prescribed legends in written general solicitation materials, submitting updated or new written general solicitation materials to the Commission and submitting Advance Form D filings for Rule 506(c) offerings and closing amendments to Form D for Rule 506 offerings. The proposed amendments to Rule 156 may cause small entities to incur some costs in reviewing their sales literature for consistency with the interpretative guidance set forth in Rule 156, but we do not expect these costs to be significant.

D. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that the proposed amendments would not duplicate, overlap or conflict with other federal rules.

E. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives of our amendments, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered several alternatives, including the following:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- further clarifying, consolidating or simplifying the proposed requirements;
- using performance rather than design standards; and
- providing an exemption from the proposed requirements, or any part of them, for small entities.

The Commission is not proposing the establishment of different compliance or reporting requirements or timetables for the rules, as proposed, for small entities. The Commission believes that, as to small entities, differing compliance, reporting or timetable requirements, a partial or complete exemption from the proposed requirements or the use of performance rather than design standards would be inappropriate because these approaches would detract from the completeness and uniformity of the Form D dataset and, as a result, reduce the expected benefits of more consistent submission of Rule 506 information and improved collection of data for Commission enforcement and rulemaking efforts. We believe that the proposed amendments to Rule 156 should apply to all private funds, regardless of size. The Commission solicits comment, however, on whether differing compliance, reporting or timetable requirements, a partial or complete exemption, or the use of performance rather than design standards would be consistent with the main goal of improving the Form D data collection process with respect to Rule 506 offerings.

F. General Request for Comment

The Commission is soliciting comments regarding this analysis. In particular, the Commission requests comment regarding:

- The number of small entities that may be affected by the proposed amendments;
- the existence or nature of the potential impact of the proposed amendments on small entities as discussed in this analysis, as well as any effects that have not been discussed; and
- how to quantify the impact of the proposed amendments.

The Commission asks those submitting comments to describe the nature of any impact and to provide empirical data to support the nature and extent of the impact. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

XII. Statutory Authority and Text of Proposed Rule and Form Amendments

The Form D and Regulation D amendments contained in this release are being proposed under the authority set forth in Sections 4(a)(2), 19(a) and 28 of the Securities Act, as amended, and Section 201(a) of the JOBS Act. The amendments to Rule 156 contained in this release are being proposed under the authority set forth in Section 19(a) of the Securities Act and Sections 10(b) and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Parts 230 and 239

Reporting and recordkeeping requirements, Securities. Advertising, Investment companies, Securities.

For the reasons set out above, the Commission proposes to amend Title 17, chapter II of the Code of Federal Regulations, as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 1. The general authority citation for Part 230 is revised to read as follows:

[236] Of this number, 3,627 of these issuers are not investment companies, and 331 are investment companies. We also note that issuers that are not investment companies disclose only revenues on Form D, and not total assets. Hence, we use the amount of revenues as a measure of issuer size.

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l,* 78m, 78n, 78*o,* 78*o*–7 note, 78t, 78w, 78*ll* (d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Pub. L. No. 112–106, sec. 201(a), 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

■ 2. Amend § 230.156 by:
■ a. Revising the heading;
■ b. In paragraph (a), adding the phrase ''or a private fund'' at the end of the first sentence.
■ c. Revising paragraphs (b)(3) introductory text, (b)(3)(ii) and (c); and
■ d. Adding paragraph (d).

The revisions and addition read as follows:

§ 230.156 Investment company and private fund sales literature.

(a) * * *

(b) * * *

(3) A statement involving a material fact about the characteristics or attributes of an investment company or a private fund could be misleading because of:

(i) * * *

(ii) Exaggerated or unsubstantiated claims about management skill or techniques, characteristics of the investment company or the private fund or an investment in securities issued by such entity, services, security of investment or funds, effects of government supervision, or other attributes; and

* * * * *

(c) For purposes of this section, the term sales literature shall be deemed to include any communication (whether in writing, by radio, or by television) used by any person to offer to sell or induce the sale of securities of any investment company or private fund. Communications between issuers, underwriters and dealers are included in this definition of sales literature if such communications, or the information contained therein, can be reasonably expected to be communicated to prospective investors in the offer or sale of securities or are designed to be employed in either written or oral form in the offer or sale of securities.

(d) For purposes of this section, the term private fund means an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) of that Act (15. U.S.C. 80a–3(c)(1) or 80a–3(c)(7)).

■ 3. Amend § 230.503 by:
■ a. Redesignating paragraphs (a)(1), (a)(2), (a)(3) and (a)(4) as paragraphs (a)(2), (a)(3), (a)(4) and (a)(6), respectively;
■ b. Adding new paragraphs (a)(1) and (a)(5);
■ c. Revising newly redesignated paragraph (a)(2);
■ d. Removing ''and'' in newly redesignated paragraph (a)(4)(ii)(I);
■ e. Removing the period and adding in its place '';'' in newly redesignated paragraph (a)(4)(iii); and
■ f. Adding new paragraphs (a)(4)(iv) and (a)(4)(v).

The revisions and additions read as follows:

§ 230.503 Filing of notice of sales.

(a) *When notice of sales on Form D is required and permitted to be filed.* (1) An issuer that intends to offer or sell securities in reliance on § 230.506(c), and has not previously filed a notice under paragraph (a)(2) of this section of such intended offering in reliance on § 230.506(c), must file with the Commission, no later than 15 calendar days prior to the first use of general solicitation or general advertising for such offering, a notice of sales containing the following information required by Form D (17 CFR 239.500) for such offering:

(i) The issuer's identity (Item 1);

(ii) Principal place of business and contact information (Item 2);

(iii) Related persons (Item 3);

(iv) Industry group (Item 4);

(v) Federal exemptions and exclusions claimed (Item 6);

(vi) Type of filing (Item 7);

(vii) Type(s) of Securities Offered (Item 9);

(viii) Business combination transaction (Item 10);

(ix) Sales compensation (Item 12); and

(x) Use of proceeds (Item 16).

(2) An issuer offering or selling securities in reliance on § 230.504, § 230.505, or § 230.506 (other than an issuer that has previously filed a notice for such offering under paragraph (a)(1) of this section) must file with the Commission a notice of sales containing the information required by Form D (17 CFR 239.500) for each new offering of securities no later than 15 calendar days after the first sale of securities in the offering.

* * * * *

(4) * * *

(iv) To contain the information required by Form D for such offering of securities in reliance on § 230.506(c), if the issuer is offering or selling securities in reliance on § 230.506(c) and has previously filed the notice under paragraph (a)(1) of this section, no later than 15 calendar days after the first sale of securities in the offering; and

(v) Not later than 30 calendar days after the termination of an offering conducted in reliance on § 230.506, unless all the information that would be included in such amendment is included in a notice previously filed under this paragraph (a) and such notice indicated that it was the closing amendment to the Form D.

(5) Where the end of a period specified for filing under paragraph (a)(1), (a)(2), (a)(4)(iv) or (a)(4)(v) of this section falls on a Saturday, Sunday or holiday, the due date for such filing would be the first business day following.

* * * * *

■ 4. Amend § 230.507 by:
■ a. Redesignating paragraph (b) as paragraph (c);
■ b. Revising paragraph (a);
■ c. Adding new paragraph (b); and
■ d. In newly redesignated paragraph (c), removing the words ''Paragraph (a)'' and adding in their place ''Paragraphs (a) and (b)''.

The revision and addition read as follows:

§ 230.507 Disqualifying provision relating to exemptions under §§ 230.504, 230.505 and 230.506.

(a) No exemption under § 230.504, § 230.505 or § 230.506 shall be available for an issuer if such issuer, or any of its predecessors or affiliates, has been subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminary or permanently enjoining such person for failure to comply with § 230.503. No exemption under § 230.506 shall be available for an issuer if such issuer, any of its predecessors or affiliates have been subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminary or permanently enjoining such person for failure to comply with § 230.509 or § 230.510T.

(b) (1) No exemption under § 230.506 shall be available for an issuer if such issuer, or any of its predecessors or affiliates, has, within the five preceding years, failed to comply with the requirements of § 230.503 in connection with an offering conducted in reliance on § 230.506, except that such exemption shall be available for offers and sales in connection with offerings that commenced before the failure to comply occurred. In determining compliance with § 230.503 for purposes of this paragraph (b)(1), a notice on Form D (§ 239.500) or amendment thereto will be deemed timely if it is filed not later than 30 calendar days after the date specified for such filing in § 230.503, unless the issuer previously failed to comply with such a filing deadline in connection with the same offering.

(2) One year after the filing by the issuer and such predecessor(s) and affiliate(s), as the case may be, of all notices on Form D (§ 239.500) and amendments thereto required under § 230.503 in connection with each offering conducted in reliance on § 230.506 that has not been terminated, and of the closing amendment required under § 230.503(a)(4)(v) with respect to each previous offering conducted in reliance on § 230.506 within the five preceding years that has been terminated, the issuer shall be permitted to rely on the exemption under § 230.506.

(3) For purposes of paragraph (b)(1) of this section, failures to comply with § 230.503 that occurred before [effective date of final rule] shall be disregarded.

* * * * *

5. Add § 230.509 to read as follows:

§ 230.509 Required legends and other disclosures.

(a) *Required legends.* An issuer shall include, in a prominent manner, the following legends in any written communication that constitutes a general solicitation or general advertising in any offering conducted in reliance on § 230.506(c):

(1) The securities may be sold only to ''accredited investors,'' which for natural persons are investors who meet certain minimum annual income or net worth thresholds;

(2) The securities are being offered in reliance on an exemption from the registration requirements of the Securities Act and are not required to comply with specific disclosure requirements that apply to registration under the Securities Act;

(3) The Commission has not passed upon the merits of or given its approval to the securities, the terms of the offering, or the accuracy or completeness of any offering materials;

(4) The securities are subject to legal restrictions on transfer and resale and investors should not assume they will be able to resell their securities; and

(5) Investing in securities involves risk, and investors should be able to bear the loss of their investment.

(b) *Additional legend for private funds.* If the issuer is a private fund, the issuer shall include, in a prominent manner, in any written communication that constitutes a general solicitation or general advertising in any offering conducted in reliance on this § 230.506(c), a legend disclosing that the securities offered are not subject to the protections of the Investment Company Act.

(c) *Required disclosure for performance data of private funds.* If the issuer is a private fund and includes performance data in any written communication that constitutes a general solicitation or general advertising in any offering conducted in reliance on this § 230.506(c):

(1) The private fund shall include in such written communication a legend disclosing that the performance data represents past performance; that past performance does not guarantee future results; that current performance may be lower or higher than the performance data presented; that the private fund is not required by law to follow any standard methodology when calculating and representing performance data; and that the performance of the private fund may not be directly comparable to the performance of other funds. The legend should also identify either a telephone number or a Web site where an investor may obtain current performance data.

(2) All performance data must be as of the most recent practicable date considering the type of private fund and the media through which the data will be conveyed, and the private fund must disclose the period for which performance is presented.

(3) If the performance presentation does not include the deduction of fees and expenses, the private fund must disclose that the presentation does not reflect the deduction of fees and expenses and that if such fees and expenses had been deducted, performance may be lower than presented.

Note to § 230.509: A private fund is an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) (15 U.S.C. 80a–3(c)(1) or 80a–3(c)(7)) of that Act. If applicable, a private fund may modify the required legend to reflect any higher minimum requirements to purchase in the offering, such as for qualified clients, as defined in § 275.205–3(d)(1) of this chapter, and qualified purchasers, as defined in section 2(a)(51) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(51)) and the rules thereunder.

■ 6. Add § 230.510T to read as follows:

§ 230.510T Submission of written general solicitation materials.

(a) An issuer shall submit to the Commission any written communication that constitutes a general solicitation or general advertising in any offering conducted in reliance on § 230.506(c) no later than the date of first use. The communication shall be submitted using the intake page designated on the Commission's Web site for the submission of such materials.

(b) This temporary rule shall expire and no longer be effective on [ ].

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 7. The authority citation for Part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l,* 78m, 78n, 78 *o*(d), 78*o*–7 note, 78u–5, 78w(a), 78*ll,* 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

■ 8. Amend Form D (referenced in § 239.500) by:

■ a. Revising Item 2;

■ b. Revising Item 3;

■ c. Revising Item 4;

■ d. In Item 5, in the first column, removing the phrase ''Decline to Disclose'' after ''Over $100,000,000'' and adding in its place ''Not Available to Public,'' and in the second column removing the phrase ''Decline to Disclose'' after ''Over $100,000,000'' and adding in its place ''Not Available to Public'';

■ e. In Item 7, adding a check box that reads ''Advance Notice—Rule 506(c) Offering'' and the word ''OR'' before ''New Notice'' and adding the word ''OR'' after ''Amendment'' and adding a check box that reads ''Closing Amendment—Rule 506 Offering'' after the word ''OR''; and

■ f. Revising Item 9;

■ g. Revising Item 14;

■ h. Revising Item 16;

■ i. Adding Items 17 through 22 to Form D; and

■ j. Revising the instruction ''When to file:'' and the instructions to Items 2, 3, 4, 5, 7, 9, 14 and 16, and adding instructions to Items 17 through 22 to the General Instructions to Form D.

The revisions and additions read as follows:

Note: The text of Form D does not, and the amendments will not, appear in the Code of Federal Regulations.

§ 239.500 Form D, notice of sales of securities under Regulation D and section 4(5) of the Securities Act of 1933.

* * * * *

Form D Notice of Exempt Offerings of Securities

* * * * *

Item 2. * * *

Issuer's publicly accessible Web site address, if any: ________

* * * * *

Item 3. * * *

Relationship(s): * * * [ ] Controlling Person (for Rule 506(c) offerings only)

* * * * *

Item 4. * * *

Clarification of Response (if Other): ________

* * * * *

Item 9. * * *

Trading Symbol for the Offered Securities, if any: ________

Generally Available Security Identifier Number for the Offered Securities, if any: ________

* * * * *

Item 14. * * *

For offerings under Rule 506 only:		Natural Persons	Legal Entities
Accredited Investors	Number		
	Amount Raised ($)		
Non-accredited Investors	Number		
	Amount Raised ($)		

* * * * *

Item 16. * * *

Issuers That Are Not Pooled Investment Funds—Offerings Under Rule 506

What fraction of offering proceeds was or will be used to repurchase/retire existing securities:

[ ] None
[ ] Less than 10%
[ ] 10–25%
[ ] 25–50%
[ ] More than 50%

What fraction of offering proceeds was or will be used to pay offering expenses:

[ ] None
[ ] Less than 10%
[ ] 10–25%
[ ] 25–50%
[ ] More than 50%

What fraction of offering proceeds was or will be used to acquire assets, otherwise than in the ordinary course of business:

[ ] None
[ ] Less than 10%
[ ] 10–25%
[ ] 25–50%
[ ] More than 50%

What fraction of offering proceeds was or will be used to finance acquisitions of other businesses:

[ ] None
[ ] Less than 10%
[ ] 10–25%
[ ] 25–50%
[ ] More than 50%

What fraction of offering proceeds was or will be used for working capital:

[ ] None
[ ] Less than 10%
[ ] 10–25%
[ ] 25–50%
[ ] More than 50%

What fraction of offering proceeds was or will be used to discharge indebtedness:

[ ] None
[ ] Less than 10%
[ ] 10–25%
[ ] 25–50%
[ ] More than 50%

Item 17. *Offerings Under Rule 506: Specify the Number of Purchasers Who Qualified as Accredited Investors on the Basis of*

[ ] Income
[ ] Net worth
[ ] Director, executive officer or general partner of issuer or its general partner
[ ] Other basis

Item 18. *Offerings Under Rule 506: National Securities Exchange or Alternative Trading System*

If the issuer's securities are traded on a national securities exchange, alternative trading system or any other organized trading venue, the name of such trading venue

____

If a class of the issuer's securities is registered under the Securities Exchange Act of 1934, the SEC file number for such class of securities

____

Check this box [ ] if the securities being offered in reliance on Rule 506 are of the same class of securities or are convertible into or exercisable or exchangeable for such class of securities.

Item 19. *Offerings Under Rule 506: Filing of General Solicitation Materials with FINRA*

If the issuer used a registered broker-dealer in connection with the offering, were general solicitation materials filed with the Financial Industry Regulatory Authority (FINRA)?

[ ] Yes [ ] No [ ] Not applicable

Item 20. *Offerings Under Rule 506: Name and SEC File Number of Investment Advisers*

If the issuer is a pooled investment fund, the name and SEC file number for each registered investment adviser or exempt reporting adviser that functions directly or indirectly as a promoter of the issuer ____________________

Item 21. *Offerings Under Rule 506(c): Types of General Solicitation and General Advertising Used or To Be Used (check all that apply)*

[ ] Email
[ ] Mass mailing
[ ] Telephone solicitations
[ ] Public Web site(s) or webcast(s). [Specify Web address(es):________]
[ ] Broadcast media
[ ] Print media
[ ] Social media
[ ] Other written communications [Specify:____________________]
[ ] Seminar(s)/meetings(s)
[ ] Other oral communications
[ ] Not applicable

Item 22. *Offerings Under Rule 506(c): Methods Used or To Be Used to Verify That Purchasers Are Accredited Investors (check all that apply):*

Non-exclusive List of Verification Methods in Rule 506(c)(2)(ii):

[ ] Verification of natural person's **income** under Rule 506(c)(2)(ii)(A)

[ ] Verification of natural person's net worth under Rule 506(c)(2)(ii)(B)

[ ] Confirmation under Rule 506(c)(2)(ii)(C) by
  [ ] Registered broker-dealer
  [ ] SEC-registered investment adviser
  [ ] Certified public accountant
  [ ] Licensed attorney

Verification Using Other Methods (check all that apply):

[ ] Publicly available information [Specify: ____________]
[ ] Documentation provided by purchaser [Specify: ____________]
[ ] Documentation provided by third parties [Specify: ____________]
[ ] Reliance on verification by a third party other than a registered broker-dealer, registered investment adviser, certified public accountant, or licensed attorney
[ ] Questionnaire
[ ] Other (Specify:____________________)

* * * * *

General Instruction

* * *

- When to file:

○ For offerings under Rule 504, Rule 505 and Rule 506(b) of Regulation D and Section 4(a)(5) of the Securities Act, an issuer must file a new notice with the SEC for each new offering of securities no later than 15 calendar days after the ''date of first sale'' of securities in the offering as explained in the Instruction to Item 7. For this purpose, the date of first sale is the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor's subscription agreement or check. An issuer may file the notice at any time before that if it has determined to make the offering. An issuer must file a new notice with each state that requires it at the time set by the state. For state filing information, go to *www.NASAA.org.* A mandatory capital commitment call does not constitute a new offering, but is made under the original offering, so no new Form D filing is required.

○ When an issuer intends to offer or sell securities under Rule 506(c) of Regulation D and has not previously filed a Form D for the offering, the issuer must file a new notice with the SEC for each new offering of securities no later than 15 calendar days prior to the first use of general solicitation or general advertising for the offering. The advance Form D is required to include the following information for such offering: the issuer's identity (Item 1), principal place of business and contact information (Item 2), related persons (Item 3), industry group (Item 4), federal exemptions and exclusions claimed (Item 6), type of filing (Item 7), type(s) of securities offered (Item 9), business combination transaction (Item 10), sales compensation (Item 12), and use of proceeds (Item 16). The information under Item 9 and Item 12 is required only to the extent that the information is known at the time of the filing of the advance Form D.

* * * * *

○ An issuer must file an amendment to a previously filed notice for an offering:

—to provide the information required by Form D for each new offering of securities in reliance on Rule 506(c) no later than 15 calendar days after the first sale of securities in the offering;

—to correct a material mistake of fact or error in the previously filed notice, as soon as practicable after discovery of the mistake or error;

—to reflect a change in the information provided in the previously filed notice, except as provided below, as soon as practicable after the change;

—annually, on or before the first anniversary of the most recent previously filed notice, if the offering is continuing at that time; and

—not later than 30 calendar days after termination of an offering conducted in reliance on Rule 506, unless a previously filed Form D amendment for such issuer with respect to the same offering includes the information that would have been disclosed in the amendment following termination of such offering and such previously filed amendment indicates that it is the closing amendment to the Form D for the offering.

* * * * *

Item-by-Item Instructions

* * * * *

Item 2. Principal Place of Business and Contact Information. * * *

Enter the issuer's publicly accessible Web site address, if any.

Item 3. Related Persons. Enter the full name and address of each person having the specified relationships with any issuer and identify each relationship:

- Each executive officer and director of the issuer and person performing similar functions (title alone is not determinative) for the issuer, such as the general and managing partners of partnerships and managing members of limited liability companies; and
- Each person who has functioned directly or indirectly as a promoter of the issuer within the past five years of first sale of securities or the date upon which the Form D filing was required to be made, whichever date is later.
- For offerings conducted in reliance on Rule 506(c) only, each person who directly or indirectly controls the issuer.

If necessary to prevent the information supplied from being misleading, also provide a clarification in the space provided.

Identify additional persons having the specified relationships by checking the box provided and attaching Item 3 continuation page(s).

Item 4. Industry Group. * * *

If Other, provide a brief description of the issuer's industry group in the space provided.

Item 5. Issuer Size.

- **Revenue Range** (for issuers that do not specify ''Hedge Fund'' or ''Other Investment Fund'' in response to Item 4): Enter the revenue range of the issuer or of all the issuers together for the most recently completed fiscal year available, or, if not in existence for a fiscal year, revenue range to date. Domestic SEC reporting companies should state revenues in accordance with Regulation S–X under the Securities Exchange Act of 1934. Domestic non-reporting companies should state revenues in accordance with U.S. Generally Accepted Accounting Principles (GAAP). Foreign issuers should calculate revenues in U.S. dollars and state them in accordance with U.S. GAAP, home country GAAP or International Financial Reporting Standards. If the issuer(s) has not otherwise made information about its revenues publicly available (for example, in general solicitation materials for an offering conducted in reliance on Rule 506(c)) and otherwise uses reasonable efforts to maintain the confidentiality of such information, enter ''Not Available to Public.'' If the issuer's(s') business is intended to produce revenue but did not, enter ''No Revenues.'' If the business is not intended to produce revenue (for example, the business seeks asset appreciation only), enter ''Not Applicable.''
- **Aggregate Net Asset Value** (for issuers that specify ''Hedge Fund'' or ''Other Investment Fund'' in response to Item 4): Enter the aggregate net asset value range of the issuer or of all the issuers together as of the most recent practicable date. If the issuer(s) has not otherwise made information about its net asset value publicly available (for example, in general solicitation materials for an offering conducted in reliance on Rule 506(c)) and otherwise uses reasonable efforts to maintain the confidentiality of such information, enter ''Not Available to Public.''

* * * * *

Item 7. Type of Filing. Indicate whether the issuer is filing a new notice, an advance notice for an offering in reliance on Rule 506(c), an amendment to a notice that was filed previously, or a closing amendment for an offering in reliance on Rule 506. If this is a new notice, enter the date of the first sale of securities in the offering or indicate that the first sale has ''Yet to Occur.'' For this purpose, the date of first sale is the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor's subscription agreement or check.

* * * * *

Item 9. Type(s) of Securities Offered. Select the appropriate type or types of securities offered as to which this notice is filed. State the trading symbol and general available security identifier, such as a CUSIP number or an International Securities Identification Number (ISIN), for the offered securities, if any. If the securities are debt convertible into other securities, however, select ''Debt'' and any other appropriate types of securities except for ''Equity.'' For purposes of this filing, use the ordinary dictionary and commonly understood meanings of these categories. For instance, equity securities would be securities that represent proportional ownership in an issuer, such as ordinary common and preferred stock of corporations and partnership and limited liability company interests; debt securities would be securities representing money loaned to an issuer that must be repaid to the investor at a later date; pooled investment fund interests would be securities that represent ownership interests in a pooled or collective investment vehicle; tenant-in-common securities would be securities that include an undivided fractional interest in real property other than a mineral property; and mineral property securities would be securities that include an undivided interest in an oil, gas or other mineral property.

* * * * *

Item 14. Investors. Indicate whether securities in the offering have been or may be sold to persons who do not qualify as accredited investors as defined in Rule 501(a), 17 CFR 230.501(a), and provide the number of such investors who have already invested in the offering. In addition, regardless of whether securities in the offering have been or may be sold to persons who do not qualify as accredited investors, specify the total number of investors who already have invested. For an offering conducted in reliance on Rule 506, state the number of natural persons who are accredited investors and non-accredited investors and purchased securities in the offering, the number of legal entities that are accredited investors and non-accredited investors and purchased securities in the offering, and the dollar amount raised from each category of investor.

* * * * *

Item 16. Use of Proceeds. For an offering conducted in reliance on Rule 506 by an issuer that is not a pooled investment fund, enter the percentage range of the offering proceeds that was or will be used to repurchase or retire the issuer's existing securities; to pay offering expenses; to acquire assets, otherwise than in the ordinary course of business; to finance acquisitions of other businesses; for working capital; and to discharge indebtedness.

Item 17. Purchasers Who Qualified as Accredited Investors. For an offering conducted in reliance on Rule 506, enter the number of purchasers who qualified as accredited investors on the basis of (1) income, (2) net worth, (3) being a director, executive officer or general partner of the issuer or its general partner, or (4) other basis.

Item 18. National Securities Exchange or Alternative Trading System. For an offering conducted in reliance on Rule 506, if the issuer's securities are traded on a national securities exchange, alternative trading system or any other organized trading venue, state the name of such trading venue. If a class of the issuer's securities is registered under the Securities Exchange Act of 1934, state the SEC file number for such class of securities. Check the box if the securities being offered in reliance on Rule 506 are of the same class of securities or are convertible into or exercisable or exchangeable for such class of securities.

Item 19. Filing of General Solicitation Materials with FINRA. For an offering conducted in reliance on Rule 506, if the issuer used a registered broker-dealer in connection with the offering, indicate whether any general solicitation materials were filed with the Financial Industry Regulatory Authority (FINRA).

Item 20. Name and SEC File Number of Investment Advisers. For an offering conducted in reliance on Rule 506 by an issuer that is a pooled investment fund, if an investment adviser functions, directly or indirectly, as a promoter of the issuer, provide the name and Commission file number for each such investment adviser that is registered with, or reporting as an exempt reporting adviser to, the Commission.

Item 21. Types of General Solicitation and General Advertising. For an offering conducted in reliance on Rule 506(c), indicate each type of general solicitation and general advertising used or to be used in the offering. If public Web site(s) or webcast(s) are used, specify the Web addresses for the public Web site(s) or webcast(s). If written communications are used other than those listed in this item, briefly describe the form of such written communications.

Item 22. Methods Used to Verify Accredited Investor Status. For an offering conducted in reliance on Rule 506(c), indicate each method used or to be used to verify that the purchasers of securities are accredited investors. If the issuer verifies the accredited investor status of purchasers other than through the non-exclusive list of verification methods in Rule 506(c)(2)(ii), specify the publicly available information, documentation provided by the purchaser or third parties, or other methods used to verify accredited investor status.

By the Commission.

Dated: July 10, 2013.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–16884 Filed 7–23–13; 8:45 am]

BILLING CODE 8011–01–P

FEDERAL REGISTER

Vol. 78 No. 142 Wednesday, July 24, 2013

Part V

Environmental Protection Agency

Seventy-Second Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency; Receipt of Report and Request for Comments; Notice

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2013–0248; FRL–9391–5]

Seventy-Second Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency; Receipt of Report and Request for Comments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Toxic Substances Control Act (TSCA) Interagency Testing Committee (ITC) transmitted its 72nd ITC Report to the Acting EPA Administrator on June 13, 2013. In the 72nd ITC Report, which is included with this notice, the ITC is revising the TSCA section 4(e) *Priority Testing List* by removing 16 chemicals with insufficient dermal absorption rate data, 98 High Production Volume (HPV) Challenge Program orphan chemicals, and 50 diisocyanates and related compounds. The ITC is removing 16 chemicals with insufficient dermal absorption rate data because information from dermal studies can be readily obtained through the Organization for Economic Cooperation and Development (OECD) and EPA databases or other authoritative scientific resources. The ITC is removing the 98 HPV Challenge Program orphan chemicals because they no longer meet the ≥ 1 million lb criterion for the HPV Challenge Program. The ITC is removing the 50 diisocyanates and related compounds because their production or importation volumes were not reported to the 2006 Inventory Update Reporting (IUR) rule or the 2012 Chemical Data Reporting (CDR) rule.

DATES: Comments must be received on or before August 23, 2013.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2013–0248, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave. NW., Washington, DC. ATTN: Docket ID Number EPA–HQ–OPPT–2013–0248. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2013–0248. EPA's policy is that all comments received will be included in the docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or email. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* John D. Walker, TSCA Interagency Testing Committee (7405M), Chemical Control Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–7527; fax number: (202) 564–7528; email address: *walker.johnd@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This notice is directed to the public in general. It may, however, be of particular interest to you if you manufacture (defined by statute to include import) and/or process TSCA-covered chemicals and you may be identified by the North American Industrial Classification System (NAICS) codes 325 and 32411. Because this notice is directed to the general public and other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be interested in this action.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–DOM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

The Toxic Substances Control Act (TSCA) (15 U.S.C. 260l *et seq.*) authorizes the Administrator of EPA to promulgate regulations under TSCA section 4(a) requiring testing of chemicals and chemical groups in order to develop data relevant to determining the risks that such chemicals and chemical groups may present to health or the environment. Section 4(e) of TSCA established the ITC to recommend chemicals and chemical groups to the Administrator of EPA for priority testing consideration. Section 4(e) of TSCA directs the ITC to revise the TSCA section 4(e) *Priority Testing List* at least every 6 months.

You may access additional information about the ITC at *http://www.epa.gov/oppt/itc.*

A. The 72nd ITC Report

The ITC is revising the TSCA section 4(e) *Priority Testing List* by removing 16 chemicals with insufficient dermal absorption rate data, 98 HPV Challenge Program orphan chemicals, and 50 diisocyanates and related compounds.

B. Status of the TSCA Section 4(e) Priority Testing List

The TSCA section 4(e) *Priority Testing List* includes 2 alkylphenols, 50 HPV Challenge Program orphan chemicals, cadmium, a category of cadmium compounds, 6 non-phthalate plasticizers, 25 phosphate ester flame retardants, 2 other flame retardants, 9 chemicals to which children living near hazardous waste sites may be exposed, and 19 diisocyanates and related compounds.

List of Subjects

Environmental protection, Chemicals, Hazardous substances.

Dated: July 15, 2013.

Wendy C. Hamnett,

Director, Office of Pollution Prevention and Toxics.

Seventy-Second Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency

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Summary

The ITC is revising the Toxic Substances Control Act (TSCA) section 4(e) *Priority Testing List* by removing 16 chemicals with insufficient dermal absorption rate data, 98 High Production Volume (HPV) Challenge Program orphan chemicals, and 50 diisocyanates and related compounds.

The TSCA section 4(e) *Priority Testing List* is Table 1 of this unit.

TABLE 1—TSCA SECTION 4(e) PRIORITY TESTING LIST

[May 2013]

ITC report	Date	Chemical name/group	Action
37	November 1995	Branched 4-nonylphenol (mixed isomers)	Recommended.
41	November 1997	Phenol, 4-(1,1,3,3-tetramethylbutyl)-	Recommended.
55	December 2004	49 High Production Volume (HPV) Challenge Program orphan chemicals	Recommended.
56	August 2005	1 HPV Challenge Program orphan chemical, naphtha (petroleum), clay-treated light straight-run.	Recommended.
68	May 2011	Cadmium	Recommended.
69	November 2011	Cadmium compounds	Recommended.
69	November 2011	6 Non-phthalate plasticizers	Recommended.
69	November 2011	25 Phosphate ester flame retardants	Recommended.
69	November 2011	2 Other flame retardants	Recommended.
69	November 2011	9 Chemicals to which children living near hazardous waste sites may be exposed.	Recommended.
69	November 2011	19 Diisocyanates and related compounds	Recommended.

I. Background

The ITC was established by TSCA section 4(e) ''to make recommendations to the Administrator respecting the chemical substances and mixtures to which the Administrator should give priority consideration for the promulgation of rules for testing under section 4(a) * * * At least every six months * * *, the Committee shall make such revisions to the *Priority Testing List* as it determines to be necessary and transmit them to the Administrator together with the Committee's reasons for the revisions'' (Public Law 94–469, 90 Stat. 2003 *et seq.,* 15 U.S.C. 2601 *et seq.*). ITC reports are available from the ITC's Web site (*http://www.epa.gov/oppt/itc*) and from regulations.gov (*http://www.regulations.gov*) after publication in the **Federal Register**. The ITC produces its revisions to the TSCA section 4(e) *Priority Testing List* with administrative and technical support from the ITC staff and ITC members. ITC members and staff are listed at the end of this report.

II. ITC's Activities During This Reporting Period (December 2012 to May 2013)

The ITC welcomed a new member and new alternate member from the Department of Commerce's National Institute of Standards and Technology and a new member from the National Science Foundation.

During this reporting period, the ITC discussed the 16 chemicals with insufficient dermal absorption rate data, branched 4-nonylphenol (mixed isomers), phenol, 4-(1,1,3,3-tetramethylbutyl)-, 148 HPV Challenge Program orphan chemicals, cadmium and cadmium compounds, 6 non-phthalate plasticizers, 25 phosphate ester and 2 other flame retardants, 9 chemicals to which children living near hazardous waste sites may be exposed, and 69 diisocyanates and related compounds remaining on the TSCA section 4(e) *Priority Testing List.* As a result of these discussions, the ITC removed 16 chemicals with insufficient dermal absorption rate data, 98 HPV Challenge Program orphan chemicals, and 50 diisocyanates and related compounds from the TSCA section 4(e) *Priority Testing List.* Orphan chemicals are those HPV chemicals for which no sponsors have volunteered to develop and submit robust summaries of basic hazard and fate testing data to the EPA. The hazard and fate testing data requested by the EPA for HPV Challenge Program orphan chemicals are necessary to establish a screening level understanding of their potential human health and environmental impacts. The chemicals with insufficient dermal absorption rate data, HPV Challenge Program orphan chemicals and diisocyanates and related compounds are discussed further in Unit III. of this 72nd ITC Report.

As noted in this unit, the ITC also discussed the following chemicals that remain on the TSCA section 4(e) *Priority Testing List:* Branched 4-nonylphenol (mixed isomers), phenol, 4-(1,1,3,3-tetramethylbutyl)-, cadmium and cadmium compounds, 6 non-phthalate plasticizers, 25 phosphate ester flame retardants, 2 other flame retardants, and 9 chemicals to which children living near hazardous waste sites may be exposed.

Branched 4-nonylphenol (mixed isomers) (CAS No. 84852–15–3) and phenol, 4-(1,1,3,3-tetramethylbutyl)-(CAS No. 140–66–9) were added to the TSCA section 4(e) *Priority Testing List* in the ITC's 37th and 41st Reports along with numerous other alkylphenols, alkylphenol ethoxylates, and poly alkylphenols (Refs. 1 and 2). The remaining data needed for branched 4-nonylphenol (mixed isomers) and phenol, 4-(1,1,3,3-tetramethylbutyl)- can be obtained from avian reproduction testing and fish multi-generation testing, respectively. Branched 4-nonylphenol (mixed isomers) and phenol, 4-(1,1,3,3-tetramethylbutyl)- will remain on the TSCA section 4(e) *Priority Testing List* until the avian reproduction testing and fish multi-generation testing is completed or other information becomes available to justify removing them from the TSCA section 4(e) *Priority Testing List.*

Cadmium and cadmium compounds were added to the TSCA section 4(e) *Priority Testing List* in the ITC's 68th and 69th Reports (Refs. 3 and 4). Cadmium and cadmium compounds were included in a TSCA section 8(d) Health and Safety Data Reporting (HaSDR) rule that was published in the **Federal Register** of December 3, 2012 (77 FR 71561) (FRL–9355–9). After receiving adverse comments to the HaSDR rule, EPA published a document withdrawing the HaSDR rule in the **Federal Register** of December 28, 2012 (77 FR 76419) (FRL–9375–3) due to questions and concerns raised about the scope and extent of the HaSDR rule. EPA is considering the questions and concerns raised in response to the HaSDR rule and next steps with regard to that rule.

Six non-phthalate plasticizers, 25 phosphate ester flame retardants, and 2 other flame retardants were added to the TSCA section 4(e) *Priority Testing List* in the ITC's 69th Report (Ref. 4). They were added to obtain existing bio-monitoring data on urinary metabolites that will be used to assess the risks of these chemicals. The 2 other flame retardants, 1,2-benzenedicarboxylic acid, 3,4,5,6-tetrabromo-, 1,2-bis(2-ethylhexyl) ester, a.k.a. bis(2-ethyl-1-hexyl) tetrabromophthalate (CAS No. 26040–51–7) and benzoic acid, 2,3,4,5-tetrabromo-, 2-ethylhexyl ester, a.k.a. 2-ethylhexyl-2,3,4,5-tetrabromobenzoate (CAS No. 183658–27–7) are included in the assessment strategy that EPA developed for brominated phthalates (*http://www.epa.gov/oppt/existingchemicals/pubs/2013wpractivities.html*).

The U.S. Department of the Interior (DOI) and Environment Canada are collaborating on a study involving exposure of American Kestrels (*Falco sparverius*) to 4 of the phosphate ester flame retardants discussed in the ITC's 69th Report (Ref. 4). The 4 phosphate ester flame retardants include: Ethanol, 2-butoxy-, 1,1',1''-phosphate, a.k.a. tri(2-butoxyethyl) phosphate (CAS No. 78–51–3); ethanol, 2-chloro-, phosphate (3:1), a.k.a. tris(2-chloroethyl) phosphate (CAS No. 115–96–8); 2-propanol, 1-chloro-, 2,2',2''-phosphate, a.k.a. tris(1-chloro-2-propyl)phosphate (CAS No. 13674–84–5) and 2-propanol, 1,3-dichloro-, phosphate (3:1), a.k.a. tris(1,3-dichloro-2-propyl) phosphate (CAS#: 13674–87–8). The study will provide novel information on uptake kinetics and potential toxicity of priority phosphate ester flame retardants that are currently found in wild bird eggs in North America. One of these phosphate ester flame retardants, ethanol, 2-chloro-, phosphate (3:1), a.k.a. tris(2-chloroethyl) phosphate (CAS No. 115–96–8) is included in the risk assessment strategy that EPA is developing for chlorinated phosphate esters (*http://www.epa.gov/oppt/existingchemicals/pubs/2013wpractivities.html*).

Nine chemicals to which children living near hazardous waste sites may be exposed were added to the TSCA section 4(e) *Priority Testing List* in the ITC's 69th Report (Ref. 4). They were added to obtain existing biomonitoring data on blood levels that will be used to fill priority data needs that were identified during the development of ATSDR's Toxicological Profiles. Priority data needs are published in the **Federal Register** and represent a wide variety of needs, including biomonitoring studies to help establish reference values for exposed populations as well as background levels for the general population (*http://www.atsdr.cdc.gov/pdns/index.asp).* The 9 chemicals to which children living near hazardous waste sites may be exposed are from the current unfilled priority data needs and any biomonitoring data will be used to conduct public health assessments. The EPA is deliberating options for satisfying the data needs for these 9 chemicals.

III. Chemicals Removed From the TSCA Section (4)(e) *Priority Testing List*

A. Chemicals With Insufficient Dermal Absorption Rate Data

In its 31st, 32nd, and 35th ITC Reports, the Occupational Safety and Health Administration (OSHA) requested that the ITC add 24, 34, and 25 chemicals, respectively, to the TSCA section 4(e) *Priority Testing List* and designate them for testing to develop dermal absorption rate data (Refs. 5, 6, and 7). The ITC removed methyl methacrylate and diethyl phthalate from the TSCA section 4(e) *Priority Testing List* in its 34th ITC Report (Ref. 8) and cyclohexanone from the TSCA section 4(e) *Priority Testing List* in its 36th ITC Report (Ref. 9). Methyl methacrylate, diethyl phthalate, and cyclohexanone were removed from the TSCA section 4(e) *Priority Testing List* because dermal absorption rate data were identified after these chemicals were added to the TSCA section 4(e) *Priority Testing List.* In its 45th ITC Report (Ref. 10), the ITC removed 47 chemicals designated for dermal absorption rate testing from the TSCA section 4(e) *Priority Testing List*, because the EPA published a rule proposing dermal absorption rate testing for these chemicals (Ref. 11). In 2004, the EPA reviewed more recent production volume, exposure, and dermal absorption rate data and promulgated a rule requiring dermal absorption rate testing for 34 of these chemicals (Ref. 12). The rationales for EPA's decision not to finalize testing requirements for the other 13 chemicals in the proposed rule are described in Ref. 11. In its 59th ITC Report, the ITC removed 16 more chemicals with insufficient dermal absorption rate data from the TSCA section 4(e) *Priority Testing List* (Ref. 13). The ITC removed these 16 chemicals because their production volumes indicated low potential for occupational exposures. In this 72nd ITC Report, the ITC is removing the 16 remaining chemicals with insufficient dermal absorption rate data from the TSCA section 4(e) *Priority Testing List* (Table 2 of this unit). OSHA determined that for these 16 chemicals, information from dermal studies can be readily obtained through the OECD existing chemical database (eChemPortal), the EPA HPV database (High Production Volume Information System (HPVIS) or other authoritative scientific resources (Ref. 14). The ITC is removing these chemicals as a result of OSHA's determination that sufficient information is currently available on the dermal absorption characteristics of these chemicals to warrant their removal from the TSCA section 4(e) *Priority Testing List.*

TABLE 2—CHEMICALS WITH INSUFFICIENT DERMAL ABSORPTION RATE DATA BEING REMOVED FROM THE PRIORITY TESTING LIST

CAS No.	Chemical name
75–12–7	Formamide.
88–72–2	Benzene, 1-methyl-2-nitro-; *o*-nitrotoluene.
89–72–5	Phenol, 2-(1-methylpropyl)-; *o*-sec-butylphenol.
90–04–0	Benzenamine, 2-methoxy-; *o*-anisidine.
95–13–6	1H-Indene; indene.
96–18–4	Propane, 1,2,3-trichloro-; 1,2,3-trichloropropane.
99–08–1	Benzene, 1-methyl-3-nitro-; *m*-nitrotoluene.
100–63–0	Hydrazine, phenyl-; phenylhydrazine.
106–49–0	Benzenamine, 4-methyl-; *p*-toluidine.
108–44–1	Benzenamine, 3-methyl-; *m*-toluidine.
108–87–2	Cyclohexane, methyl-; methylcyclohexane.
121–14–2	Benzene, 1-methyl-2,4-dinitro-; 2,4-dinitrotoluene.
287–92–3	Cyclopentane.
540–59–0	Ethene, 1,2-dichloro-; 1,2-dichloroethylene.
542–92–7	1,3-Cyclopentadiene.
626–17–5	1,3-Benzenedicarbonitrile; 1,3-dicyanobenzene.

B. HPV Challenge Program Orphan Chemicals

In 2004, at the EPA's request, the ITC added 281 HPV Challenge Program orphan (unsponsored) chemicals to the TSCA section 4(e) *Priority Testing List* in the ITC's 55th and 56th Reports (Refs. 15 and 16). As of December 2012, 133 HPV Challenge Program orphan chemicals had been removed from the TSCA section 4(e) *Priority Testing List* because they were included in EPA's test rules, the testing was voluntarily sponsored or because they no longer met the > 1 million lb criterion for the HPV Challenge Program. Based on data received from the 2006 IUR rule, and the 2012 CDR rule, EPA identified 98 HPV Challenge Program orphan chemicals with production volumes consistently below 1 million lb. Since these 98 chemicals no longer exceed the 1 million lb criterion for the HPV Challenge Program, EPA is requesting their removal from the TSCA section 4(e) *Priority Testing List* in this 72nd ITC Report (Ref. 17). The 98 HPV Challenge Program orphan chemicals being removed from the TSCA section 4(e) *Priority Testing List* are listed in Table 3 of this unit. The 50 HPV Challenge Program orphan chemicals remaining on the TSCA section 4(e) *Priority Testing List* are listed in Table 4 of this unit.

TABLE 3—HIGH PRODUCTION VOLUME CHALLENGE PROGRAM ORPHAN CHEMICALS BEING REMOVED FROM THE TSCA SECTION 4(e) PRIORITY TESTING LIST

CAS No.	Chemical name
77–76–9	Propane, 2,2-dimethoxy-.
81–07–2	1,2-Benzisothiazol-3(2H)-one, 1,1-dioxide.
81–84–5	1H,3H-Naphtho[1,8-cd]pyran-1,3-dione.
85–40–5	1H-Isoindole-1,3(2H)-dione, 3a,4,7,7a-tetrahydro-.
97–00–7	Benzene, 1-chloro-2,4-dinitro-.
101–34–8	9-Octadecenoic acid, 12-(acetyloxy)-, 1,1′,1″-(1,2,3-propanetriyl) ester, (9Z,9′Z,9″Z,12R,12′R,12″*R*)-.
104–93–8	Benzene, 1-methoxy-4-methyl-.
110–33–8	Hexanedioic acid, 1,6-dihexyl ester.
111–91–1	Ethane, 1,1′-[methylenebis(oxy)]bis[2-chloro-.
118–90–1	Benzoic acid, 2-methyl-.
138–25–0	1,3-Benzenedicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester.
139–40–2	1,3,5-Triazine-2,4-diamine, 6-chloro-N2,N4-bis(1-methylethyl)-.

TABLE 3—HIGH PRODUCTION VOLUME CHALLENGE PROGRAM ORPHAN CHEMICALS BEING REMOVED FROM THE TSCA SECTION 4(e) PRIORITY TESTING LIST—Continued

CAS No.	Chemical name
140–93–2	Carbonodithioic acid, *O*-(1-methylethyl) ester, sodium salt (1:1).
142–73–4	Glycine, *N*-(carboxymethyl)-.
330–54–1	Urea, *N′*-(3,4-dichlorophenyl)-*N,N*-dimethyl-.
513–74–6	Carbamodithioic acid, ammonium salt (1:1).
529–33–9	1-Naphthalenol, 1,2,3,4-tetrahydro-.
557–61–9	1-Octacosanol.
563–72–4	Ethanedioic acid, calcium salt (1:1).
592–45–0	1,4-Hexadiene.
617–94–7	Benzenemethanol, .alpha.,.alpha.-dimethyl-.
628–13–7	Pyridine, hydrochloride (1:1).
628–96–6	1,2-Ethanediol, 1,2-dinitrate.
645–62–5	2-Hexenal, 2-ethyl-.
693–95–8	Thiazole, 4-methyl-.
756–80–9	Phosphorodithioic acid, *O,O*-dimethyl ester.
939–97–9	Benzaldehyde, 4-(1,1-dimethylethyl)-.
1000–82–4	Urea, *N*-(hydroxymethyl)-.
1002–69–3	Decane, 1-chloro-.
1111–78–0	Carbamic acid, ammonium salt (1:1).
1445–45–0	Ethane, 1,1,1-trimethoxy-.
1498–51–7	Phosphorodichloridic acid, ethyl ester.
1912–24–9	1,3,5-Triazine-2,4-diamine, 6-chloro-N2-ethyl-N4-(1-methylethyl)-.
2152–64–9	Benzenamine, 4,4′-[[4-(phenylimino)-2,5-cyclohexadien-1-ylidene]methylene]bis[*N*-phenyl-, hydrochloride (1:1).
2524–03–0	Phosphorochloridothioic acid, *O,O*-dimethyl ester.
2814–20–2	4(3H)-Pyrimidinone, 6-methyl-2-(1-methylethyl)-.
2905–62–6	Benzoyl chloride, 3,5-dichloro-.
2915–53–9	2-Butenedioic acid (2Z)-, 1,4-dioctyl ester.
3132–99–8	Benzaldehyde, 3-bromo-.
3779–63–3	1,3,5-Triazine-2,4,6(1H,3H,5H)-trione, 1,3,5-tris(6-isocyanatohexyl)-.
3965–55–7	1,3-Benzenedicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, sodium salt (1:1).
4035–89–6	Imidodicarbonic diamide, *N,N′*,2-tris(6-isocyanatohexyl)-.
4316–73–8	Glycine, *N*-methyl-, sodium salt (1:1).
5216–25–1	Benzene, 1-chloro-4-(trichloromethyl)-.
5460–09–3	2,7-Naphthalenedisulfonic acid, 4-amino-5-hydroxy-, sodium salt (1:1).
5915–41–3	1,3,5-Triazine-2,4-diamine, 6-chloro-N2-(1,1-dimethylethyl)-N4-ethyl-.
7795–95–1	1-Octanesulfonyl chloride.
10265–69–7	Glycine, *N*-phenyl-, sodium salt (1:1).
13749–94–5	Ethanimidothioic acid, *N*-hydroxy-, methyl ester.
13826–35–2	Benzenemethanol, 3-phenoxy-.
17321–47–0	Phosphoramidothioic acid, *O,O*-dimethyl ester.
19438–61–0	1,3-Isobenzofurandione, 5-methyl-.
19525–59–8	Glycine, *N*-phenyl-, potassium salt (1:1).
20068–02–4	2-Butenenitrile, 2-methyl-, (2Z)-.
20227–53–6	Phosphorous acid, 2-(1,1-dimethylethyl)-4-[1-[3-(1,1-dimethylethyl)-4-hydroxyphenyl]-1-methylethyl]phenyl bis(4-nonylphenyl) ester.
25154–38–5	Piperazineethanol.
25168–05–2	Benzene, chloromethyl-.
25168–06–3	Phenol, (1-methylethyl)-.
25383–99–7	Octadecanoic acid, 2-(1-carboxyethoxy)-1-methyl-2-oxoethyl ester, sodium salt (1:1).
26377–29–7	Phosphorodithioic acid, *O,O*-dimethyl ester, sodium salt (1:1).
26401–27–4	Phosphorous acid, isooctyl diphenyl ester.
27193–28–8	Phenol, (1,1,3,3-tetramethylbutyl)-.
30574–97–1	2-Butenenitrile, 2-methyl-, (2E)-.
34689–46–8	Phenol, methyl-, sodium salt (1:1).
38185–06–7	Benzenesulfonic acid, 4-chloro-3,5-dinitro-, potassium salt (1:1).
39515–51–0	Benzaldehyde, 3-phenoxy-.
40630–63–5	1-Octanesulfonyl fluoride.
40876–98–0	Butanedioic acid, 2-oxo-, 1,4-diethyl ester, ion(1-), sodium (1:1).
51632–16–7	Benzene, 1-(bromomethyl)-3-phenoxy-.
52663–57–7	Ethanol, 2-butoxy-, sodium salt (1:1).
57693–14–8	Chromate(3-), bis[3-(hydroxy-.kappa.O)-4-[2-[2-(hydroxy-.kappa.*O*)-1-naphthalenyl] diazenyl-.kappa.N1]-7-nitro-1-naphthalenesulfonato(3-)]-, sodium (1:3).
61789–85–3	Sulfonic acids, petroleum.
63302–49–8	Phosphorochloridous acid, bis(4-nonylphenyl) ester.
64743–02–8	Alkenes, C>10 .alpha.-.
64743–03–9	Phenols (petroleum).
65996–83–0	Extracts, coal tar oil alk.
65996–86–3	Extract oils (coal), tar base.
65996–87–4	Extract residues (coal), tar oil alk.
68081–86–7	Phenol, nonyl derivs.
68188–18–1	Paraffin oils, chlorosulfonated, saponified.
68309–16–0	Fatty acids, tall-oil, 2-(2-hydroxyethoxy)ethyl esters.

TABLE 3—HIGH PRODUCTION VOLUME CHALLENGE PROGRAM ORPHAN CHEMICALS BEING REMOVED FROM THE TSCA SECTION 4(e) PRIORITY TESTING LIST—Continued

CAS No.	Chemical name
68608–59–3	Ethane, 1,2-dichloro-, manuf. of, by-products from, distn. lights.
68609–05–2	Cyclohexane, oxidized, non-acidic by-products, distn. lights.
68815–50–9	Octadecanoic acid, reaction products with 2-[(2-aminoethyl)amino]ethanol.
68915–05–9	Fatty acids, tall-oil, low-boiling, reaction products with ammonia-ethanolamine reaction by-products.
68918–16–1	Tar, coal, dried and oxidized.
68937–29–1	1,6-Hexanediol, distn. residues.
68937–69–9	Carboxylic acids, C6–18 and C5–15-di-.
68955–37–3	Acid chlorides, tallow, hydrogenated.
68987–41–7	Benzene, ethylenated.
68987–66–6	Ethene, hydrated, by-products from.
68990–65–8	Fats and Glyceridic oils, vegetable, reclaimed.
70851–08–0	Amides, coco, N-[3-(dimethylamino)propyl], alkylation products with sodium 3-chloro-2-hydroxypropanesulfonate.
72854–27–4	Tannins, reaction products with sodium bisulfite, sodium polysulfide and sodium sulfite.
83864–02–2	Nickel, bis[(cyano-.kappa.*C*)triphenylborato(1-)-kappa.*N*]bis(hexanedinitrile-.kappa.*N*,.kappa.*N′*)-.
84501–86–0	Hexanedioic acid, esters with high-boiling C6–10-alkene hydroformylation products.
90640–86–1	Distillates (coal tar), heavy oils.
125997–20–8	Phosphoric acid, mixed 3-bromo-2,2-dimethylpropyl and 2-bromoethyl and 2-chloroethyl esters.

TABLE 4—HIGH PRODUCTION VOLUME PROGRAM ORPHAN CHEMICALS REMAINING ON THE TSCA SECTION 4(e) PRIORITY TESTING LIST

CAS No.	Chemical name
94–96–2	1,3-Hexanediol, 2-ethyl-.
104–66–5	Benzene, 1,1′-[1,2-ethanediylbis(oxy)]bis-.
107–39–1	1-Pentene, 2,4,4-trimethyl-.
107–40–4	2-Pentene, 2,4,4-trimethyl-.
111–85–3	Octane, 1-chloro-.
121–82–4	1,3,5-Triazine, hexahydro-1,3,5-trinitro-.
137–20–2	Ethanesulfonic acid, 2-[methyl[(9Z)-1-oxo-9-octadecen-1-yl]amino]-, sodium salt (1:1).
529–34–0	1(2H)-Naphthalenone, 3,4-dihydro-.
590–19–2	1,2-Butadiene.
598–72–1	Propanoic acid, 2-bromo-.
1401–55–4	Tannins.
1738–25–6	Propanenitrile, 3-(dimethylamino)-.
2210–79–9	Oxirane, 2-[(2-methylphenoxy)methyl]-.
2372–45–4	1-Butanol, sodium salt (1:1).
2409–55–4	Phenol, 2-(1,1-dimethylethyl)-4-methyl-.
2425–54–9	Tetradecane, 1-chloro-.
2691–41–0	1,3,5,7-Tetrazocine, octahydro-1,3,5,7-tetranitro-.
3039–83–6	Ethenesulfonic acid, sodium salt (1:1).
3386–33–2	Octadecane, 1-chloro-.
4170–30–3	2-Butenal.
4860–03–1	Hexadecane, 1-chloro-.
8001–58–9	Creosote.
17103–31–0	Urea, sulfate (2:1).
17976–43–1	2,4,6,8,3,5,7-Benzotetraoxatriplumbacycloundecin-3,5,7-triylidene, 1,9-dihydro-1,9-dioxo-.
21351–39–3	Urea, sulfate (1:1).
24794–58–9	Formic acid, compd. with 2,2′,2″-nitrilotris[ethanol] (1:1).
26680–54–6	2,5-Furandione, dihydro-3-(octen-1-yl)-.
28908–00–1	Benzothiazole, 2-[(chloromethyl)thio]-.
38321–18–5	Ethanol, 2-(2-butoxyethoxy)-, sodium salt (1:1).
52184–19–7	Phenol, 2,4-bis(1,1-dimethylpropyl)-6-[2-(2-nitrophenyl)diazenyl]-.
56803–37–3	Phosphoric acid, (1,1-dimethylethyl)phenyl diphenyl ester.
68187–41–7	Phosphorodithioic acid, *O,O*-di-C1–14-alkyl esters.
68187–59–7	Coal, anthracite, calcined.
68308–74–7	Amides, tall-oil fatty, *N,N*-di-Me.
68309–27–3	Fatty acids, tall-oil, sulfonated, sodium salts.
68441–66–7	Decanoic acid, mixed esters with dipentaerythritol, octanoic acid and valeric acid.
68515–89–9	Barium, carbonate nonylphenol complexes.
68527–22–0	Naphtha (petroleum), clay-treated light straight-run.
68584–25–8	Benzenesulfonic acid, C10–16-alkyl derivs., compds. with triethanolamine.
68602–81–3	Distillates, hydrocarbon resin prodn. higher boiling.
68649–42–3	Phosphorodithioic acid, *O,O*-di-C1–14-alkyl esters, zinc salts.
68650–36–2	Aromatic hydrocarbons, C8, *o*-xylene-lean.
68782–97–8	Distillates (petroleum), hydrofined lubricating-oil.
68919–17–5	Hydrocarbons, C12–20, catalytic alkylation by-products.
68953–80–0	Benzene, mixed with toluene, dealkylation product.
68955–76–0	Aromatic hydrocarbons, C9–16, biphenyl deriv.-rich.
68990–61–4	Tar, coal, high-temp., high-solids.

TABLE 4—HIGH PRODUCTION VOLUME PROGRAM ORPHAN CHEMICALS REMAINING ON THE TSCA SECTION 4(e) PRIORITY TESTING LIST—Continued

CAS No.	Chemical name
70084–98–9	Terpenes and Terpenoids, C10–30, distn. residues.
71077–05–9	Ethanol, 2,2′-oxybis-, reaction products with ammonia, morpholine product tower residues.
119345–02–7	Benzene, 1,1′-oxybis-, tetrapropylene derivs.

C. Diisocyanates and Related Compounds

At the request of the current EPA member to the ITC, 69 diisocyanates and related compounds were added to the TSCA section 4(e) *Priority Testing List* in the ITC's 69th Report. They were added to obtain numerous data on diisocyanates and related compounds used to formulate a broad class of polyurethane products (e.g., sealants, adhesives, etc.) that are intended to further react upon end-use (Ref. 4). The EPA determined that 50 of these diisocyanates and related compounds were not reported to the EPA's 2006 IUR and 2012 CDR rules. Since these 50 diisocyanates and related compounds were not reported to the EPA's 2006 IUR and 2012 CDR rules, EPA is requesting their removal from the TSCA section 4(e) *Priority Testing List* in this 72nd ITC Report (Ref. 17). The 50 diisocyanates and related compounds being removed from the TSCA section 4(e) *Priority Testing List* are listed in Table 5 of this unit. The 19 diisocyanates and related compounds remaining on the TSCA section 4(e) *Priority Testing List* are listed in Table 6 of this unit.

TABLE 5—FIFTY DIISOCYANATES AND RELATED COMPOUNDS BEING REMOVED FROM THE TSCA SECTION 4(e) PRIORITY TESTING LIST

CAS No.	Chemical name
104–49–4	Benzene, 1,4-diisocyanato-.
123–61–5	Benzene, 1,3-diisocyanato-.
139–25–3	Benzene, 1,1′-methylenebis[4-isocyanato-3-methyl-.
2422–91–5	Benzene, 1,1′,1″-methylidynetris[4-isocyanato-.
2536–05–2	Benzene, 1,1′-methylenebis[2-isocyanato-.
3634–83–1	Benzene, 1,3-bis(isocyanatomethyl)-.
4035–89–6	Imidodicarbonic diamide, *N,N′*2-tris(6-isocyanatohexyl)-.
4128–73–8	Benzene, 1,1′-oxybis[4-isocyanato-.
7517–76–2	Cyclohexane, 1,4-diisocyanato-, trans-.
9017–01–0	Benzene, 1,3-diisocyanatomethyl-, homopolymer; TDI homopolymer.
9019–85–6	Benzene, 1,3-diisocyanatomethyl-, trimer.
10347–54–3	Cyclohexane, 1,4-bis(isocyanatomethyl)-.
13622–90–7	Cyclohexane, 1,1′-methylenebis[4-isocyanato-, (trans,trans)-.
16325–38–5	Benzene, 1,2,4,5-tetrachloro-3,6-bis(isocyanatomethyl)-.
17589–24–1	1,3-Diazetidine-2,4-dione, 1,3-bis[4-[(4-isocyanatophenyl)methyl]phenyl]-.
23370–68–5	1,3-Diazetidine-2,4-dione, 1,3-bis[(5-isocyanato-1,3,3-trimethylcyclohexyl)methyl]-.
25686–28–6	Benzene, 1,1′-methylenebis[4-isocyanato-, homopolymer; MDI homopolymer.
25854–16–4	Benzene, bis(isocyanatomethyl)-.
26603–40–7	1,3,5-Triazine-2,4,6(1H,3H,5H)-trione, 1,3,5-tris(3-isocyanatomethylphenyl)-.
31107–36–5	1,3-Diazetidine-2-one, 1,3-bis[4-[(4-isocyanatophenyl)methyl]phenyl]-4-[[4-[(4-isocyanatophenyl)methyl]phenyl]imino]-.
38661–72–2	Cyclohexane, 1,3-bis(isocyanatomethyl)-.
42170–25–2	Cyclohexane, bis(isocyanatomethyl)-.
50639–37–7	2H-1,3,5-Oxadiazine-2,4,6(3H,5H)-trione, 3,5-bis(6-isocyanatohexyl)-.
50830–59–6	1,3,4-Thiadiazole, 2-isocyanato-5-(trifluoromethyl)-, dimer.
51508–06–6	1,3,4-Thiadiazole, 2-(1,1-dimethylethyl)-5-isocyanato-, dimer.
53880–05–0	Cyclohexane, 5-isocyanato-1-(isocyanatomethyl)-1,3,3-trimethyl-, homopolymer; isophorone diisocyanate homopolymer.
55525–54–7	Urea, *N,N′*-bis[(5-isocyanato-1,3,3-trimethylcyclohexyl)methyl]-.
60732–52–7	Carbamic acid, *N,N′*-(3-isocyanatomethylphenyl)-, *C,C′*-(oxydi-2,1-ethanediyl) ester.
65087–21–0	Carbamic acid, *N*-[4-[(4-isocyanatocyclohexyl)methyl]cyclohexyl]-, *C,C′*-(oxydi-2,1-ethanediyl) ester.
65104–99–6	Imidodicarbonic diamide, 2,2′-[methylenebis(2-chloro-4,1-phenylene)]bis[*N,N′*-bis(3-isocyanatomethylphenyl)-.
65105–00–2	Carbamic acid, *N*-(3-isocyanatomethylphenyl)-, *C,C′*-(1-methyl-1,3-propanediyl) ester.
65105–02–4	Carbamic acid, *N*-(3-isocyanatomethylphenyl)-, *C,C′*-(1,4-butanediyl) ester.
67873–91–0	1,3,5-Triazine-2,4,6(1H,3H,5H)-trione, 1,3,5-tris[(5-isocyanato-1,3,3-trimethylcyclohexyl)methyl]-.
68083–39–6	Benzenamine, *N,N′*-methanetetraylbis[3-isocyanato-2,4,6-tris(1-methylethyl)-.
68092–73–9	Carbamic acid, *N*-(3-isocyanatomethylphenyl)-, *C,C′*-(1,2-ethanediyl) ester.
68092–74–0	Carbamic acid, *N*-(3-isocyanatomethylphenyl)-, *C,C′*-[oxybis(1-methyl-2,1-ethanediyl)] ester.
68133–14–2	Carbamic acid, *N*-(3-isocyanatomethylphenyl)-, *C,C′*-[[[(diethoxyphosphinyl)methyl]imino]di-2,1-ethanediyl] ester.
68310–46–3	Hexanoic acid, [[2-ethyl-2-[[[[5-isocyanato-1(or 5)-(methoxycarbonyl)pentyl]amino]carbonyl]oxy]methyl]-1,3-propanediyl]bis(oxycarbonylimino)]bis[isocyanato-, 1,1′-dimethyl ester.
68366–14–3	Carbamic acid, *N*-[5-isocyanato-2(or 4)-methylphenyl]-, *C,C′*-(1-methyl-1,3-propanediyl) ester.
68555–56–6	1,3-Diazetidine-2,4-dione, 1,3-bis(4-isocyanato-3-methylphenyl)-.
68975–84–8	Carbamic acid, *N*-[(5-isocyanato-1,3,3-trimethylcyclohexyl)methyl]-, *C,C′*-(oxydi-2,1-ethanediyl) ester.
69878–18–8	Hexanoic acid, 2,6-diisocyanato-, 2-isocyanatoethyl ester.
70024–76–9	Hexatriacontane, diisocyanato-, branched.
70198–24–2	Undecane, 1,6,11-triisocyanato-.
71130–76–2	Urea, *N*-(3-isocyanatomethylphenyl)-*N′*-[[[4-[[[(3-isocyanatomethylphenyl)amino]carbonyl]amino]phenyl]methyl]phenyl]-.
71832–70–7	Carbamic acid, *N*-[4-[(4-isocyanatophenyl)methyl]phenyl]-, *C,C′*-(oxydi-2,1-ethanediyl) ester.

TABLE 5—FIFTY DIISOCYANATES AND RELATED COMPOUNDS BEING REMOVED FROM THE TSCA SECTION 4(e) PRIORITY TESTING LIST—Continued

CAS No.	Chemical name
75790–84–0	Benzene, 2-isocyanato-4-[(4-isocyanatophenyl)methyl]-1-methyl-.
75790–87–3	Benzene, 1-isocyanato-2-[(4-isocyanatophenyl)thio]-.
85702–90–5	2,9,11,13-Tetraazanonadecanethioic acid, 19-isocyanato-11-(6-isocyanatohexyl)-10,12-dioxo-, *S*-[3-(trimethoxysilyl)propyl] ester.
106790–31–2	Benzenamine, 4-isocyanato-*N,N*-bis(4-isocyanatophenyl)-2,5-dimethoxy-.

TABLE 6—NINETEEN DIISOCYANATES AND RELATED COMPOUNDS REMAINING ON THE TSCA SECTION 4(e) PRIORITY TESTING LIST

CAS No.	Chemical name
91–08–7	Benzene, 1,3-diisocyanato-2-methyl-.
91–97–4	1,1′-Biphenyl, 4,4′-diisocyanato-3,3′-dimethyl-.
101–68–8	Benzene, 1,1′-methylenebis[4-isocyanato-.
584–84–9	Benzene, 2,4-diisocyanato-1-methyl-.
822–06–0	Hexane, 1,6-diisocyanato-.
2778–42–9	Benzene, 1,3-bis(1-isocyanato-1-methylethyl)-.
3173–72–6	Naphthalene, 1,5-diisocyanato-.
3779–63–3	1,3,5-Triazine-2,4,6(1H,3H,5H)-trione, 1,3,5-tris(6-isocyanatohexyl)-.
4098–71–9	Cyclohexane, 5-isocyanato-1-(isocyanatomethyl)-1,3,3-trimethyl-.
5124–30–1	Cyclohexane, 1,1′-methylenebis[4-isocyanato-.
5873–54–1	Benzene, 1-isocyanato-2-[(4-isocyanatophenyl)methyl]-.
9016–87–9	Isocyanic acid, polymethylenepolyphenylene ester.
15646–96–5	Hexane, 1,6-diisocyanato-2,4,4-trimethyl-.
16938–22–0	Hexane, 1,6-diisocyanato-2,2,4-trimethyl-.
26447–40–5	Benzene, 1,1′-methylenebis[isocyanato-.
26471–62–5	Benzene, 1,3-diisocyanatomethyl-.
26747–90–0	1,3-Diazetidine-2,4-dione, 1,3-bis(3-isocyanatomethylphenyl)-.
28182–81–2	Hexane, 1,6-diisocyanato-, homopolymer; HDI homopolymer.
68239–06–5	Cyclohexane, 2-heptyl-3,4-bis(9-isocyanatononyl)-1-pentyl-.

IV. References

1. ITC. Thirty-Seventh Report of the ITC; Notice. **Federal Register** (61 FR 4188, February 2, 1996) (FRL–4991–6). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
2. ITC. Forty-First Report of the ITC; Notice. **Federal Register** (63 FR 17658, April 9, 1998) (FRL–5773–5). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
3. ITC. Sixty-Eighth Report of the ITC; Notice. **Federal Register** (76 FR 46174, August 1, 2011) (FRL–8879–3). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
4. ITC. Sixty-Ninth Report of the ITC; Notice. **Federal Register** (77 FR 30856, May 23, 2012) (FRL–9346–3). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
5. ITC. Thirty-First Report of the ITC; Notice. **Federal Register** (58 FR 26898, May 5, 1993) (FRL–4583–4). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
6. ITC. Thirty-Second Report of the ITC; Notice. **Federal Register** (58 FR 38490, July 16, 1993) (FRL–4630–2). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
7. ITC. Thirty-Fifth Report of the ITC; Notice. **Federal Register** (59 FR 67596, December 29, 1994) (FRL–4923–2). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
8. ITC. Thirty-Fourth Report of the ITC; Notice. **Federal Register** (59 FR 35720, July 13, 1994) (FRL–4870–4). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
9. ITC. Thirty-Sixth Report of the ITC; Notice. **Federal Register** (60 FR 42982, August 17, 1995) (FRL–4965–6). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
10. ITC. Forty-Fifth Report of the ITC; Notice. **Federal Register** (65 FR 75544, December 1, 2000) (FRL–6399–5). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
11. EPA. Proposed Test Rule for In Vitro Dermal Absorption Rate Testing of Certain Chemicals of Interest to Occupational Safety and Health Administration; Proposed Rule. **Federal Register** (64 FR 31074, June 9, 1999) (FRL–5760–3). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
12. EPA. In Vitro Dermal Absorption Rate Testing of Certain Chemicals of Interest to the Occupational Safety and Health Administration; Final Rule. **Federal Register** (69 FR 22402, April 26, 2004) (FRL–7312–2). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
13. ITC. Fifty-Ninth Report of the ITC; Notice. **Federal Register** (72 FR 2756, January 22, 2007) (FRL 8110–2). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
14. OSHA. Letter to Dr. John D. Walker, re: OSHA's comments for removal of 16 chemicals on the TSCA Section 4(e) *Priority Testing List.* April 10, 2013. Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
15. ITC. Fifty-Fifth Report of the ITC; Notice. **Federal Register** (70 FR 7364, February 11, 2005) (FRL–7692–1). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
16. ITC. Fifty-Sixth Report of the ITC; Notice. **Federal Register** (70 FR 61520, October 24, 2005) (FRL–7739–9). Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.
17. EPA. Memo to Dr. John D. Walker, re: EPA's comments on removal of 98 High Production Volume (HPV) Challenge Program orphan chemicals and 50 diisocyants and related compounds from the TSCA Section 4(e) *Priority Testing List.* May 8, 2013. Available at *www.regulations.gov.* Docket ID number EPA–HQ–OPPT–2013–0248.

V. The TSCA Interagency Testing Committee

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Jessica Reliner, Alternate
Environmental Protection Agency
Robert W. Jones, Member
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[FR Doc. 2013–17545 Filed 7–23–13; 8:45 am]

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FEDERAL REGISTER

Vol. 78 Wednesday,

No. 142 July 24, 2013

Part VI

The President

Proclamation 8998—Captive Nations Week, 2013

Federal Register

Vol. 78, No. 142

Wednesday, July 24, 2013

Presidential Documents

Title 3—

The President

Proclamation 8998 of July 19, 2013

Captive Nations Week, 2013

By the President of the United States of America

A Proclamation

As citizens of the oldest democracy on earth, we believe that all people are created equal with certain inalienable rights, including life, liberty, and the pursuit of happiness. Together, we have kept that most basic promise shining bright for more than two centuries—upholding civil rights and expanding their reach, advancing freedom's march and widening the circle of opportunity for all.

Our commitment to universal rights is also a foundation for American leadership abroad. In the course of our Nation's history, countries worldwide have pledged themselves to a Universal Declaration of Human Rights. Corrupt dictatorships have given way to new democracies, forcing out the stale air of authoritarian rule with a fresh breath of freedom.

We know that work is not yet complete. Even as the light of liberty and justice has spread across the globe, too many people still labor in the darkness of tyranny and oppression. In too many parts of the world, fundamental freedoms remain unrealized, and the protections of law extend only to a privileged few.

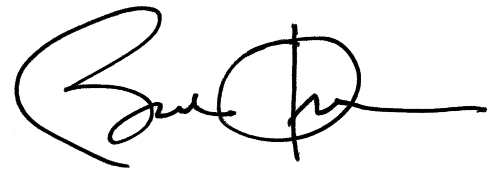
Captive Nations Week is an opportunity to reaffirm America's role in advancing human rights worldwide. It is a task that can begin here, with the example we set and the understanding that we are stronger when all our people are granted opportunity—no matter what they look like, where they worship, or who they love. And it can continue by extending a hand to those who reach for freedom abroad. Different peoples will determine their own paths. But we must reject the notion that those who live in distant places do not yearn for freedom, self-determination, dignity, and the rule of law, just as we do.

When President Dwight D. Eisenhower first marked this day, he noted that it should recur ''until such time as freedom and independence shall have been achieved for all the captive nations of the world.'' We have come a long way since then—but despite our progress, that time has not yet come. So let us keep striving to bring it about—supporting those who seek the same freedoms we enjoy as Americans, and extending the blessings of peace and prosperity here at home and around the world.

The Congress, by joint resolution approved July 17, 1959 (73 Stat. 212), has authorized and requested the President to issue a proclamation designating the third week of July of each year as ''Captive Nations Week.''

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim July 21 through July 27, 2013, as Captive Nations Week. I call upon the people of the United States to reaffirm our deep ties to all governments and people committed to freedom, dignity, and opportunity for all.

IN WITNESS WHEREOF, I have hereunto set my hand this nineteenth day of July, in the year of our Lord two thousand thirteen, and of the Independence of the United States of America the two hundred and thirty-eighth.



[FR Doc. 2013–17956
Filed 7–23–13; 11:15 am]
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